FILED

(1) No. 951980 MAY 29 1996

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In The

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, t/a GALAXY MANOR, A NEW JERSEY PARTNERSHIP,

Petitioners,

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

Petition for Writ of Certiorari to the New Jersey Supreme Court

PETITION FOR WRIT OF CERTIORARI

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124 pp

QUESTIONS PRESENTED

Over the course of four public hearings on landlords' rent increase application, a sitting rent control board member expressly declared himself a tenants' advocate, personally investigated the application outside the record, testified against the application as to that information, advised a tenant to file Federal Fair Housing charges against the landlord and threatened and verbally abused the landlord and his attorney, all in the presence of the full board in public session. The board denied landlords' pleas for the biased member's disqualification and he persisted in the same manner throughout the hearings, ignoring admonitions by board counsel and finally leading board deliberations to deny most of the application. The trial court, as fact finder, noted that his taint "permeated" the board. The questions presented are:

I. Whether plainly biased municipal agency decision making violates substantative due process, triggering liability under 42 U.S.C. § 1983?

II. Whether the conduct should be deemed "random and unauthorized", barring plaintiffs' claims under 42 U.S.C. § 1983 pursuant to *Parrat's* procedural due process analysis?

III. Whether the conduct should be deemed "purposeful discrimination" in violation of equal protection, triggering liability under 42 U.S.C. § 1983?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioners, David Rivkin, Edward Rivkin and Judith Rivkin, trading as Galaxy Manor, a New Jersey Partnership, respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at 143 N.J. 352, 671 A.2d 567 (1996) and is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the Superior Court of New Jersey, Appellate Division is reported at 277 N.J. Super 559, 649 A.2d 1356 (1994) and is reproduced in the Appendix at 38a. The unreported opinions and orders of the Superior Court of New Jersey, Law Division in this case are reproduced at 53a, 55a, 61a, 63a and 75a.

STATEMENT OF JURISDICTION

The New Jersey Supreme Court entered its judgment on February 29, 1996. The jurisdiction of this court is invoked under 28 U.S.C.§ 1257 (a).

STATUTE INVOLVED

The pertinent provision of the Federal Civil Rights Act, as amended, 42 U.S.C. § 1983 is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

David Rivkin, Edward Rivkin and Judith Rivkin are partners in Galaxy Manor, a mobile home park in Dover Township, New Jersey. In May, 1990, the Rivkins filed an application with the Dover Township Rent Leveling Board ("the Board") seeking approval of an application for rental increases based upon capital improvements allowable by local ordinance made within the mobile home park in the amount of $59,624.96.

The Board conducted four hearings on the application in June, July, August and October, 1990. From the outset, Board member Edward Baltarzuk, adopted a hostile and plainly biased attitude toward the Rivkins and their attorney, Michael E. Levin. He declared on the record that he was "here to serve the people of the mobile home parks." As the New Jersey Supreme Court noted "he continually challenged the Rivkins and their representatives both on a personal basis, referring to their attorney as a 'yo-yo,' and on a partisan basis, introducing facts from outside the record." (App. A, 4a).

Baltarzuk threatened the Rivkins stating: "you are looking for trouble and you are going to get it." He urged a tenant to file a complaint against the Rivkins for alleged violations of the equal housing opportunity laws. Baltarzuk deliberately investigated facts outside the record pertaining to the cost of the capital improvement items, tenant rent levels and other issues and attempted to discredit the application by testifying as to those facts during the hearings. On one occasion, during a discussion of street cleaning equipment, Mr. Baltarzuk stated "I don't care if he cleans the streets with a toothbrush" referring to

Mr. Rivkin. These examples characterize an almost unbroken continuum of harassment and partisanship.

During the hearings, the Rivkins made several applications for Baltarzuk's removal by the Board, which were repeatedly denied. In deliberations, Baltarzuk continued to play an antagonistic role, spearheading discussion to deny or reduce items in the application and voting against most of the capital improvements. In the end, the Board granted slightly more than one third of the capital improvements contained in the application, for a total of $20,641.42 in rent increases.

In accordance with the New Jersey procedure for challenging local agency action, the Rivkins filed an action in lieu of prerogative writs pursuant to N.J. Constitution Art. VI, § 5, ¶4 as implemented by New Jersey Court Rule 4:69. In addition, the Rivkins alleged a cause of action under 42 U.S.C. § 1983, asserting that Baltarzuk's actions and the Board's failure to disqualify him deprived them of their property in derogation of their constitutional rights of substantive and procedural due process as well as equal protection of the laws.

The trial court agreed that Baltarzuk's biased and prejudiced behavior deprived the Rivkins of their due process rights and remanded the entire application to the Board. (App. F, 63a; App. G, 75a). The remand order specifically required the hearings to be conducted without Baltarzuk. (App. E, 61a). The court reserved decision on the Rivkins' application for counsel fees under 42 U.S.C. § 1988 and declined to make a substantive determination on the rental increase application. The Rivkins unsuccessfully sought leave to file an interlocutory appeal challenging the remand order to the New Jersey Appellate Division.

Upon the rehearing, the Board approved an additional rental increase of $25,089.67 for a total of $45,731.09 or nearly two and

one half times the original amount. Thereafter, the court considered the attorney fee and compensatory damages issues and awarded the Rivkins $39,679.55 in counsel fees and costs and $6,303.34 in compensatory damages under 42 U.S.C. §§ 1983, 1988. (App. C, 53a). The court stated in its bench opinion that Baltarzuk's actions had "permeated the Board," and that the Board was "recalcitrant" regarding the Rivkins' request to disqualify Baltarzuk and that, therefore, the Board's behavior constituted a deprivation of the Rivkins' due process rights. (App. D, 55a).

Both parties appealed. The Rivkins appealed the remand order, asserting that the trial judge should have determined the substantive issue of the rental increases due to Baltarzuk's prejudicial effect on the Board. The Rivkins also appealed the trial court's denial of certain portions of its attorney fee application. The Board appealed the award of §1983 counsel fees and compensatory damages.

The New Jersey Superior Court, Appellate Division affirmed the remand order but reversed the trial court's finding of due process violations under §1983, vacating the order for attorneys fees and costs. 277 N.J. Super 559, 649 A.2d 1356 (1994) (App. B). Without consideration of the dichotomy between substantive and procedural due process violations, the Appellate Division applied *Parrat v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) and held that Baltarzuk's behavior was "random and unauthorized", that the plaintiffs had an adequate postdeprivation remedy in the form of the action in lieu of the prerogative writs and, therefore, the requirements of due process had been met.

The New Jersey Supreme Court granted the Rivkins' Petition for Certification and, in a ruling which candidly acknowledged its divergence of opinion with numerous Circuit Courts of Appeal, affirmed the judgment of the Appellate

Division. While acknowledging the dichotomy between substantive and procedural due process claims under the *Parrat* analysis, the New Jersey court ruled that the reach of substantive due process claims should be sharply limited to "state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning and harmful as literally to shock the conscience of a court." (App. A, 12a) (*quoting Ramos v. Gallo*, 596 F. Supp. 833, 837 (D. Mass. 1984).) With respect to the Rivkins' procedural due process claims, the New Jersey Supreme Court agreed that Baltarzuk's behavior was "random and unauthorized", not the result of an "established state procedure" and that the availability of New Jersey's prerogative writ action constituted an adequate postdeprivation remedy. Finally, the court dismissed the Rivkins' equal prctection claims, stating that "the majesty of the Equal Protection Clause should not be invoked every time that applications are incorrectly denied by a municipal agency." (App. A, 32a).

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari because of the pivotal importance of § 1983 remedies to the protection of property rights against government abuse. Uncertainty as to the availability of the § 1983 remedies affects property rights at all levels: whether in the case of a large conglomerate seeking a determination of its oil and gas exploration rights or the residential property owner seeking to build a small addition to his home, adverse agency action based on personal biases effects a system of dubious justice. The effects are pervasive: every city and town is called upon to determine property rights without authoritative guidance in the proper conduct of hearings and deliberations to determine these property rights. There are no doubt economic costs passed down the economic chain insofar as the uncertainty of government determinations clouds property values and discourages

prospective development. It is, therefore, of vital importance for the court to address the constitutional implications of deliberately biased municipal agency action. This case presents an opportunity for the Court to erect the "guide posts for responsible decision making" which were noted for their scarcity in *Collins v. City of Harker Hts.*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261, 273 (1992).

The importance of this case and the need for the Court's supervision is highlighted by the patchwork of conflicting views expressed in lower court opinions. The conflict was candidly noted by the New Jersey Supreme Court in this case when it stated:

> We acknowledge that the standard that we adopt today may be contrary to a more expansive interpretation given the Due Process Clause by many circuit courts, which have found that "arbitrary or irrational" government actions deny substantive due process rights. See, e.g. *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 593 (3rd. Cir.) (concluding that "in the context of land use regulations, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached") *Cert. Denied*, __ U.S.__, 116 S. Ct. 352, 133 L. Ed. 2d 247 (1995) (additional citations omitted).

App. A, 17a. The New Jersey Supreme Court noted that its view was contrary to case law in the Second, Third, Fourth and Ninth Circuits. *Id.* at 17a, 18a.

Commentators and courts have increasingly noted this divergence with most circuits recognizing an "arbitrary and irrational" test for substantive due process in the land use context and only one or two circuits imposing stricter standards. *See, e.g.*, Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. Dayton L. Rev. 313 (1991) wherein the author collects cases from the First, Second, Third, Fifth, Eighth, and Ninth Circuits adopting the arbitrary and irrational or arbitrary and capricious standard in actions against municipal boards asserting substantive due process claims. *(Id.* at notes 78, 79).

Another commentator has enumerated no less than six tests which have gained currency in substantive due process review: (1) rational basis review; (2) the arbitrary or capricious standard; (3) a shocks-the-conscience-like standard; (4) a factor balancing test used in excessive force claims; (5) deference to professional standards and the exercise of professional judgment; and (6) a recklessness or deliberate indifference standard. Michael J. Phillips, *The Non-Privacy Applications of Substantive Due Process*, 21 Rutgers Law Journal 537, at 575-77 (1990) (citations omitted). A recent article comparing this case and its companion *General Motors Corp. v. City of Linden*, 143 N.J. 336 (1996) with the less restrictive federal view expressed in *DeBlasio v. Zoning Board of Adjustment for the Twp. of West Amwell*, 53 F.3d 592 (3d. Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1995) concluded:

> In Federal Court, to maintain an action for violation of substantive due process, the plaintiff must prove that the regulation or decision was "arbitrary or irrational". In contrast, in state court to overturn such a decision, the plaintiff must prove that such a

> decision was "arbitrary, capricious and unreasonable". The courts of New Jersey view "arbitrary, capricious and unreasonable" as being a term of art relating to a failure to a local agency to follow necessary standards in its decision making, rather than as involving "egregious governmental abuses against liberty or property," which appears to be the view of the Third Circuit. *The U.S. Supreme Court will have to provide further clarification and guidance before this issue is resolved.*

(Emphasis added). Michael A. Pane, Jr., *Federal Courts Receptive to Civil Rights Claims,* 144 N.J. L. J. 626, at 657 (May 13, 1996). Similarly, it has been stated "[T]he lower courts' differing approaches to the treatment of substantive due process in these areas suggest the obvious need for Supreme Court clarification." *Levinson, supra.* 16 U. Dayton L. Rev. at 318. Cited in *Rivkin, supra.* 143 N.J. at 371. (App. A, 20a). Arguably, the most compelling reason for granting the Writ, is that the judgment below is at odds with Supreme Court rulings in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L. Ed. 303 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183, 187, 48 S. Ct. 447, 448, 72 L. Ed. 842 (1928) and, more recently, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974) and *Village of Arlington Hgts. v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). Each of these cases has applied a variant of the "arbitrary or irrational" test for the constitutionality of local land use enactments and decisions. However, as noted, there is considerable debate among the lower courts and the Supreme Court's guidance is needed.

Finally, beyond the conflict with federal court precedent,

the New Jersey Supreme Court decision is erroneous in several important respects. First, it did not believe the blatant and deliberate partisanship and abusive behavior on the part of Mr. Baltarzuk at open public meetings was "shocking to the conscience" so as to give rise to a substantive due process claim. The Rivkins contend that short of physical violence or blatantly racist behavior, it is hard to conceive of a state action which could be more shocking to the conscience than night after night of unyielding abuse and partisanship by a public official in full view of his fellow board members who, in turn, took no action to curtail these activities. Our constitutional conscience should be shocked when the *quasi* judicial or legislative functions carried out by local land use and rent control boards can be carried out with such contempt for an applicant's basic rights to fundamental fairness. The New Jersey court's view of conscience shocking behavior is so narrow that it is defined out of existence in the context of land use and rent control unless there is an actual assault or racial incident. This cannot and should not be.

After dispatching the Rivkins' substantive due process claims, the New Jersey court analyzed the case under the procedural due process framework established in *Parrat v. Taylor*. In so doing, it erred in finding that the continuous pattern of conduct by Mr. Baltarzuk and the failure of the defendant board to disqualify him constituted "random and unauthorized" behavior. It remains unclear how that factual determination could be made when the individual publicly declares himself to be an advocate rather than an impartial fact finder and the board acquiesces when it does not remove him. The plain meaning of the terms "random and unauthorized" simply cannot be coaxed out of this scenario.

In addition, the question of whether behavior is "random and unauthorized" requires a finding as to whether or not the

board could practicably provide a predeprivation remedy. In theory, if the behavior is truly random and authorized, as when it is unknown to the state, it is impossible for the state to provide a predeprivation remedy. Here, where Mr. Baltarzuk made his position clear from the very first moment of the four hearings, the state had notice of the deprivation well in advance of its final determination of the capital improvement application. A remedy (disqualification) was practicable, available and appropriate. Therefore, under the *Parrat* analysis, the New Jersey Supreme Court erroneously found that the offending conduct was "random and unauthorized."

Finally, in rejecting the Rivkins' Equal Protection Claims the New Jersey Court overlooked the "purposeful discrimination" standard enunciated in *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1944). *Snowden* has been applied to the land use context in *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980) where the court noted: "There must be allegations of unfair and discriminatory conduct purposefully directed toward plaintiffs." The record in this case firmly establishes that Baltarzuk acted in a way which was unfair and discriminatory and purposefully directed toward the Rivkins.

I.

PLAINLY BIASED MUNICIPAL AGENCY ACTION VIOLATES SUBSTANTIVE DUE PROCESS AND TRIGGERS LIABILITY UNDER 42 U.S.C. § 1983.

The Rivkins' § 1983 claims are properly founded on substantive due process protections. Therefore, the doctrine of *Parrat* does not bar their 1983 claims and remedies. Notably, all three New Jersey Courts acknowledged that the record of the rent control hearings clearly established that Baltarzuk was biased,

that he acted as an advocate for the tenants, that he had sought information outside the record, and that he had tainted the deliberations of the board. (App. A, 4a-5a).[1]

The court below deemed that the conduct as contained in the record is not "shocking to the conscience". In this reference to *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1951) New Jersey has expressed its view that substantive due process claims will only be recognized in cases factually similar to *Rochin*, where police officers ordered a doctor to pump Rochin's stomach against his will. It concluded:

> In light of the clearly evident trend of the Supreme Court to limit substantive due process rights under the Fourteenth Amendment we believe, that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation.

(App. A, 13a). It further stated "disputes about the regularity of state procedures do not represent the type egregious conduct that rises to the level of a substantive due process violation." (*Id.* at 36a).

The New Jersey court implies that substantive due process violations are limited to personal privacy and physical intrusion cases. However, a voluminous body of case law in the land use context contradicts the New Jersey Supreme Court's restrictive reading of the substantive due process clause. As noted above,

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1. The New Jersey Supreme Court stated "although Baltarzuk maintained that he was not prejudiced and should not have been disqualified, we accept the lower courts' findings for purposes of this appeal". (App. A, 21a).

the majority of Federal Circuit Courts of Appeal have found substantive due process violations where the municipal agency conduct is "arbitrary and irrational". For example, in *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990) the court held that allegations that city council members revoked a previously approved development permit in response to political pressure after plaintiff had complied with fifteen conditions of approval stated a viable substantive due process claim which survived summary judgment. In *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988) it was held that the plaintiffs had sufficiently alleged a substantive due process violation where it was alleged that certain town council members had personal animosity towards one of plaintiff's employees and would not allow issuance of the building permit for so long as the plaintiff employed that individual. In one Second Circuit opinion, the political and intermunicipal rivalry that gave rise to plaintiff's § 1983 claims manifested itself in a statement by one of the zoning commission members closely resembling the statements made by Mr. Baltarzuk here. Specifically, in *Brady v. Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988) the zoning commission member, a Township Official, divulged her partisan motives against the neighboring Borough of Colchester when she said "if Mr. Brady (plaintiff) wasn't renting to the Borough I would vote to accept the plans." *Id.* at 203.

In *Littlefield v. City of Afton*, 785 F.2d 596, 603-606 (8th Cir. 1986) the court noted that the Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits have held that substantive due process claims may be based on the denial of a land use permit. It particularly noted that even the First Circuit, which has expressed the most restrictive view in this area "has recognized that on rare occasions a denial of a land use permit may be the basis for a § 1983 claim" citing *Roy v. City of Augusta*, 712 F.2d 1517 (1st Cir. 1983). In *Roy*, the city council defied a state court

order to issue a license to a billiard hall and instead issued an expired license. The *Roy* court said that the plaintiff must "prove that his injury was due not merely to the law's delay and the councillors' errors but to [the council's] deliberate disregard of the state's fundamental process". *Id* at 1524. In sum, New Jersey has elected to part company with the broad based federal precedent that municipal agency decision making can result in substantive due process claims. The federal view looks to wrongful motivation as opposed to mere error and there was no mere error in this case.

The New Jersey Supreme Court rejects the "arbitrary and irrational" standard utilized by many federal court opinions to find substantive due process violations. At the same time, New Jersey confuses the federal "arbitrary and irrational" standard with New Jersey's standard in agency review cases, "arbitrary, capricious and unreasonable." (App. A, 17a-20a). That standard requires challengers to agency action to demonstrate that the action was not based on "substantial evidence" in the record made before that agency. *See, e.g., Kramer v. Bd. of Adj. Sea Girt*, 45 N.J. 268, 296 (1965). *Anastasio v. Planning Bd. of Twp. of West Orange*, 209 N.J. Super. 499, 522 (App. Div.), *cert. denied*, 107 N.J. 46 (1986) noted that "while the words arbitrary and capricious may sound harsh, they are simply the standard of appellate review and the decision that the board has been arbitrary and capricious is simply a finding of error. Further, as happened here, New Jersey law granted the victim of such a mistaken action a complete remedy, so there was no deprivation, only a delay." *Id.* (citations omitted).

In contrast, the federal court usage of the term "arbitrary and irrational" has been equated with more than a mere mistake. Rather, the federal terminology implicates actions which are devoid of justification, unrelated to the merits or motivated by partisan, political or personal reasons. *See, eg., Del Monte*

Dunes supra, 920 F.2d 1496 (9th Cir. 1990); *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2d Cir. 1988); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988); *Wheeler v. City of Ocean Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982).

The New Jersey Supreme Court adhered to the minority view of the Eighth Circuit decision in *Lemke v. Cass County*, 846 F.2d 469, 471 (8th Cir. 1987) wherein Chief Judge Arnold noted in a concurrence that substantive due process protection should be reserved for "truly irrational" government abuses that bear no relationship to the merits of the pending matter. (App. A, 19a). As an example, Judge Arnold suggested a decision process by coin toss. However, a coin toss would have been more "truly rational" in regards to consideration of the merits of the rental increase application than the affirmative distortion of the process occasioned by Baltarzuk's conduct and the Board's mute expression of acquiescence. The New Jersey court took Judge Arnold's dictum two steps beyond its plain meaning when it reasoned that Baltarzuk's actions were not "truly irrational" since he operated from the "mistaken premise . . . " "that it was his duty to serve as a tenants' advocate . . . " and that all of Baltarzuk's actions were related to the merits of the rent proceeding." (App. A, 19a). This strained reasoning is faced with several difficulties. First, the ordinance under which the Rent Control Board operates clearly prohibited Mr. Baltarzuk from adopting a partisan position or from considering information outside the record, much less gathering of such information or testifying regarding such information.[2]

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2. Dover Township ordinances Section 104-35.2 as set forth in the Appellate Division opinion specifies that

Board shall give both the landlord and tenant

(Cont'd)

Second, Baltarzuk was admonished by the Board's attorney on more than one occasion with specific instructions explaining that he was not permitted to obtain information from outside the record or testify at the hearings. Despite the fact that Baltarzuk disregarded these express guidelines at each hearing the Board repeatedly rejected pleas for his disqualification. Against this background, it is uncertain how the New Jersey Supreme Court deems Baltarzuk's blatant advocacy as properly resting on a "mistaken premise" about his role or in any way related to the merits of the application.

In *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986), the Court applied the *Parrat* doctrine to the negligent acts of a prison guard who left a pillow on the jail stairs causing a prisoner to slip and sustain injuries. In his concurrence, Justice Stevens described the reach of the Due Process Clause:

> Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property. (citations omitted). No decision of this court before *Parrat* supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forbearer in the Magna Carta (citation omitted) was

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(Cont'd)

> reasonable opportunity to be heard before making any determination and shall base its determination on the reasonable, credible evidence before it.

(App. B, 48a).

> "intended to secure the individual from the arbitrary exercise of the powers of government," (citations omitted). *See also, Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974) ("the touch stone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L. Ed. 623 (1889)") (citation omitted). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property" the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, *eg., Rochin, supra,* it serves to prevent government power from being "used for purposes of oppression," (citations omitted).

Id. at 106 S. Ct. 665. The Rivkins argue that government power was used for purposes of oppression, that the proceedings were devoid of fairness and that the board acted arbitrarily and deliberately within the meaning of Justice Stevens' comments in *Daniels*.

The Rivkins further argue that irrational conduct, for purposes of substantive due process analysis should be equated with conduct that plainly displays an utter disregard for applying the law fairly, deliberately and even handedly. That, in the first instance, is shocking to the conscience. It is not equal justice and it is not fairness in any modern, democratic sense as set forth by Justice Stevens in *Daniels v. Williams*. As board members, it is one thing to assert a point of view, and quite another to

demonstrate that you have no point of view except opposition and animosity towards the applicant. Such bias is inescapably arbitrary, irrational and unrelated to the merits of an application affecting important property rights. Because there was a clear denial of substantive due process, *Parrat* does not apply and the New Jersey Supreme Court judgment should be reversed.

II.

PLAINLY BIASED CONDUCT AT PUBLIC HEARINGS SHOULD NOT BE DEEMED "RANDOM AND UNAUTHORIZED" AND PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1983 ARE NOT BARRED PURSUANT TO *PARRATT'S* PROCEDURAL DUE PROCESS ANALYSIS.

When dealing with procedural due process cases, the *Parrat* doctrine requires a finding that the state action was "random and unauthorized" and, therefore, a predeprivation remedy was impracticable.[3] The compelling logic of *Parrat* is that it is unreasonable to expect state governments at all levels to be able to police the day-to-day activities of every government official and employee. Such a requirement would turn the mistake or misguided zeal of each such individual into a federal cause of action under §1983 no matter how remote the activity.

That logic falls away where the conduct is known, as it was here, to the government agency. It continued from the very beginning of the hearings through the final deliberations. Furthermore, it continued over the repeated objections of the Rivkins' attorney and their requests for Baltarzuk's disqualification. It even continued despite the admonitions of the Board's own attorney that the conduct was unacceptable. In

3. The Rivkins, of course, maintain that there is no need to apply the doctrine of *Parrat* since the presence of substantive due process violations places this case beyond its reach.

sum, the Board knew of the conduct and, therefore, had the opportunity to provide a predeprivation remedy. The true test of whether conduct is "random and unauthorized" turns on the question of the state's knowledge of the deprivation at a point in time where it is capable of providing a remedy before the deprivation is complete.

The New Jersey opinion questions the board's ability to provide the predeprivation remedy suggested by the Rivkins. New Jersey relies on *Hochberg v. Freehold Racing Ass'n.*, 40 N.J. Super. 276, 123 A.2d 46 (1956) to decide that the Board did not "authorize" Baltarzuk's actions by failing to disqualify him because they did not have the power to do so. (App. A, 25a-26a). The *Hochberg* opinion does not support this premise and the court's rationale is not persuasive. In *Hochberg*, the New Jersey Appellate Division reversed local planning board action where a voting member had a direct pecuniary interest in the applicant race track. The *Hochberg* court only addresses the scope of the official's duty in such a case. It quite clearly does not address any limitation on the powers of the Planning Board to disqualify a conflict-tainted member who does not voluntarily do so when it states:

> Whenever a substantial question is raised as to the disinterestedness of one of several officials sitting on a matter, and the other officials can take care of the case, it usually is just as well for the official in question to withdraw therefrom, so that not the faintest shadow be cast on the integrity of the determination.

Hochberg, supra, 40 N.J. *supra,* 284. The flaw in the court's reasoning is that if *Hochberg* is read as limiting the Board's powers to disqualify, what is presumed to happen at hearings

where a conflict is raised and a board member refuses to step down? Surely, it makes better sense that the agency should disqualify its obstinate member, or at a minimum, decline to count that member for a quorum or voting purposes. No legal authority prohibits boards from doing so.

The Rivkins contend that the Board's power to disqualify is implicit in its enabling ordinance. Specifically, in the powers and duties delegated to the rent leveling board by the Dover Code, the Board:

> Is hereby granted and shall have and exercise, in addition to other powers herein granted, all the powers necessary and appropriate to carry out and execute the purposes of this article, . . .

Paragraph 2 of the same ordinance requires the board to give "both the landlord and tenant reasonable opportunity to be heard before making any determination and shall base its determination on the reasonable, credible evidence before it . . . " When confronted with a biased member who refuses to hear the case on its merits the board is presented with a clear violation of its own rules. The enabling language of the ordinance clearly grants it the powers "necessary and appropriate to carry out and execute the purposes of the article."

In fact, a leading treatise on New Jersey local government law recommends that attorneys should advise members of the following procedures concerning perceived conflict situations:

> 3. If the attorney, after discussing the situation with a member potentially in conflict, believes there is a conflict, then the member should step aside. Failure to do so may be cause from removal from office.

Michael A. Pane, *Local Government Law,* New Jersey Practice Vol. 35 (West Publishing Co., 1993) Section 351, p. 54.

The basic premise of procedural due process is that, before a deprivation of property or liberty takes place, the affected party must be afforded notice and an opportunity to be heard "at a meaningful time and in a meaningful manner". *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1181, 14 L. Ed. 2d 62 (1965). While the Rivkins may have had notice and an opportunity to be heard, it cannot be said that there was anything meaningful in the manner of the board's hearings so long as the panel included, and was heavily tainted by, a clearly biased board member. In keeping with that fundamental principle of due process, the New Jersey Supreme Court ruling should be reversed.

III.

PLAINLY BIASED MUNICIPAL AGENCY DECISION MAKING SHOULD BE DEEMED "PURPOSEFUL DISCRIMINATION" IN VIOLATION OF EQUAL PROTECTION, TRIGGERING LIABILITY UNDER 42 U.S.C. § 1983.

In rejecting the Rivkins' Equal Protection Claims the New Jersey Supreme Court overlooked the "purposeful discrimination" standard enunciated in *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 401, 88 L. Ed. 497 (1944). *Snowden* considered claims of constitutional deprivation under the predecessor statute to 42 U.S.C. § 1983 by a primary election candidate who claimed he was improperly excluded from the election ballot. The court noted that the petitioner's Equal Protection Claims would succeed if:

> There is shown to be present in it (ie. the state

> action) an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person . . . (citation omitted). . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. . . (citations omitted). . . . there must be a showing of "clear and intentional discrimination" (citations omitted).

Here the discrimination by Baltarzuk was both intentional and purposeful and the discrimination was apparent on the face of his actions.

The *Snowden* doctrine recently has been applied to the land use context in *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir. 1980). The court stated:

> A claim under § 1983 for discriminatory enforcement of zoning regulations must involve an element of "intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L. Ed. 497; *Tollett v. Laman*, 497 F.2d 1231 (8th Cir. 1974). There must be allegations of "unfair and discriminatory conduct purposely directed toward plaintiffs."

The record in this case clearly describes unfair and discriminatory conduct purposefully directly toward the Rivkins. Therefore, the § 1983 claims should not have been dismissed.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION AND DECISION OF THE NEW JERSEY SUPREME COURT DECIDED FEBRUARY 29, 1996

SUPREME COURT OF NEW JERSEY
A-26 September Term 1995

DAVID RIVKIN, EDWARD RIVKIN, and JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership,

Plaintiffs-Appellants,

v.

DOVER TOWNSHIP RENT LEVELING BOARD,

Defendant-Respondent.

Argued October 24, 1995 — Decided February 29, 1996

On certification to the Superior Court, Appellate Division, whose opinion is reported at 277 *N.J. Super.* 559 (1994).

Reuel E. Topas argued the cause for appellants (*Levin, Shea, Pfeffer, McMahon and Russell*, attorneys).

Courtland T. Babcock, II, argued the cause for respondent (*Babcock, Hennes & Bielory*, attorneys).

Bruce D. Greenberg argued the cause for *amicus curiae* Hudson County Taxpayers' Association (*Greenbaum, Rowe, Smith, Ravin & Davis*, attorneys).

Stuart R. Koenig argued the cause for *amici curiae* New Jersey State League of Municipalities and New Jersey Institute of Municipal Attorneys (*Stickel, Koenig & Sullivan*, attorneys).

Appendix A

Margaret B. Carmeli submitted a brief on behalf of *amicus curiae* The New Jersey Manufactured Housing Association (*Giordano, Halleran & Ciesla*, attorneys; *Paul H. Schneider*, of counsel; *Ms. Carmeli* and *Debra J. Rubenstein*, on the briefs).

The opinion of the Court was delivered by

O'HERN, J.

The question in this appeal is whether a party that has appeared before a local rent leveling board has a claim under the Federal Civil Rights Act, 42 *U.S.C.* § 1983, for an unconstitutional deprivation of property when a member of the board has acted in a biased manner and the other members of the board did not remove or disqualify the member lacking in impartiality. The question is related to that concerning an allegedly unconstitutional tax assessment in *General Motors v. Linden, N.J.* (1996), also decided today. In *General Motors*, we relied on *National Private Truck Council. Inc. v. Oklahoma Tax Comm'n*, 515 *U.S.* __, 115 *S. Ct.* 2351, 132 *L. Ed.* 2d 509 (1995), to conclude that there was no basis for courts to award relief under § 1983 when an adequate state legal remedy exists to correct an arbitrary tax assessment. We find that similar principles of federalism lead generally to the same conclusion in the context of land use controls.

The primary issue is whether the doctrine of *Parratt v. Taylor*, 451 *U.S.* 527, 101 *S. Ct.* 1908, 68 *L. Ed.* 2d 420 (1981), applies in this context of municipal rent controls. *Parratt* holds that when a deprivation of property results from the random and unauthorized actions of a state employee and pre-deprivation process would have been impracticable, there is no due process violation so long as an adequate post-deprivation remedy is available. We hold that, absent egregious misconduct that shocks

the conscience in the sense of violating civilized norms of governance, or invidious discrimination on the part of a board member or board, so long as the State provides a plain, adequate and timely remedy to redress irregularities in the proceedings, a party aggrieved by the determinations of a municipal rent leveling board does not have a claim for relief under 42 *U.S.C.* § 1983.

I.

David Rivkin, Edward Rivkin, and Judith Rivkin are partners in Galaxy Manor, a mobile home park in Dover Township. Dover Township has a Mobile Home Park Rent Leveling Ordinance ("Code") that requires landlords to apply to the Dover Township Rent Leveling Board ("Board") for rental increases. Dover Code § 104-35A provides that the Board be made up of one mobile home park landlord, one mobile home park tenant, and three non-affiliated public members.

In May 1990, the Rivkins filed an application with the Board for a rent increase based on $59,624.96 of capital improvements to the Galaxy Manor mobile home park. The Code provides:

> A landlord may seek an additional charge for major capital improvements.... The landlord seeking a capital improvement surcharge shall appeal for said surcharge to the Rent Leveling Board, which shall determine . . . if said improvement is a major improvement and, if so, the amount of increase granted for such major improvement and establish the conditions of such increase.
>
> [Dover Code § 104-34B.]

Appendix A

The Board conducted four hearings on the application in June, July, August and October, 1990. Edward Baltarzuk, the mobile home park tenant member of the Board, took an active part in the proceedings. Baltarzuk, who was actually a resident of the Galaxy Manor Mobile Home Park, appeared to view his position on the Board as one of advocacy rather than adjudication. He stated on the record that it was his function to "serve the people of the mobile home park." He continually challenged the Rivkins and their representatives both on a personal basis, referring to their attorney as a "yo-yo," and on a partisan basis, introducing facts from outside the record.

Baltarzuk's manner was threatening to the Rivkins. He said: "You are looking for trouble and you are going to get it. " Baltarzuk urged a tenant witness to file a complaint against the Rivkins for violating equal housing opportunity laws. The following is a typical antagonistic exchange between the Rivkins and Baltarzuk:

> Mr. Levin (attorney for Rivkin): That is our application. Our obligation is to provide this application —
>
> Mr. Baltarzuk: You are supposed to file the truth, sir.
>
> Mr. Levin: Before you call anyone a liar, you are the fellow that is challenging our application without giving us the benefit of telling us where you get the information.
>
> Mr. Rivkin, is the rental structure as contained within the application true and accurate?

> Mr. Rivkin: As of the first of May, yes.
>
> Mr. Baltarzuk: Therefore, this application should not even be heard. It is an illegal rental increase. I have a person right here in the audience who is paying a wrong rent. How can she pay 275? You are telling me here she is paying 223.
>
> Mr. Levin: I find this incredible, that somebody who has to make a judgment here has apparently taken it upon himself to go out and solicit whatever it is your [sic] trying to tell us. . . .

Baltarzuk, in essence, offered himself as a witness concerning certain items and was, in effect, testifying in the proceedings.

The Rivkins requested that Baltarzuk be removed from the proceedings. The Board denied these requests and, with Baltarzuk participating, granted $20,641.42 in rent increases for capital improvements, finding that the majority of the Rivkins' application constituted "capital expenditures" rather than "major capital improvements" under the ordinance. Capital expenditures may not be recovered by rent increases.

The Rivkins appealed to the Law Division to determine the amount of the rental increase. They claimed that the "arbitrary, capricious, and unreasonable" findings of the Board and the failure of the Board to disqualify Baltarzuk for his obvious bias constituted a civil rights violation allowing recovery of damages and attorney's fees under 42 *U.S.C.* § 1983.

Appendix A

The Law Division reserved decision on the application for attorney's fees but agreed that Baltarzuk's misconduct and manifest bias had tainted the proceedings. However, it refused to make a substantive determination on the rental increase. It ruled that the Board members were not biased and would not be influenced once Baltarzuk was removed. The court remanded the matter to the Board with all issues to be reconsidered without the participation of Baltarzuk. The Appellate Division denied the Rivkins' motion for leave to appeal the remand order. The hearings proceeded on remand without the participation of Baltarzuk. Upon rehearing, the Board approved an additional increase of $25,089.67 for a total of $45,731.09. The Law Division then disposed of the issue of attorney's fees and constitutional damages. In its bench opinion, the Law Division found that Baltarzuk's actions had "permeated the Board," "that the Board was recalcitrant with respect to th[e] matter" of his participation, and had "violated the plaintiffs' due process rights." It awarded $39,679.55 in counsel fees and $6,303.34 in compensatory damages under 42 *U.S.C.* §§ 1983, 1988.

Both parties appealed. The Rivkins appealed the remand to the Board, claiming that the Law Division should have made the substantive determination of the rental increase because the entire Board had been tainted by Baltarzuk's bias. The Board appealed the imposition of § 1983 relief and attorney's fees.

The Appellate Division affirmed the remand order, but found that the plaintiffs had suffered no due process violation under § 1983, and therefore were not entitled to attorney's fees or compensatory damages. 277 *N.J. Super.* 559, 570 (1994). Basing its ruling on *Parratt v. Taylor,* 451 *U.S.* 527, 101 *S. Ct.* 1980, 68 *L. Ed.* 2d 420 (1981), the Appellate Division found the actions of Baltarzuk to be "random and unauthorized," that the

plaintiffs had had an adequate post-deprivation remedy under state law, and that the requirements of procedural due process had been satisfied. We granted plaintiffs' petition for certification. 140 *N.J.* 275 (1995).

II

Section 1983 is the modern codification of the first section of legislation passed as part of the Ku Klux Klan Act of 1871 ("the Act").[1] The Act, entitled "an Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," addressed conditions then prevalent in some of the southern States. *Monroe v. Pape*, 365 *U.S.* 167, 171-173, 81 *S. Ct.* 473, 476-77, 5 *L. Ed.* 2d 492, 497 (1961) (quotation omitted). At that time, former slaves and their descendants were subjected to egregious violations of liberty and property, and state governments were either incapable or

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1. As originally enacted, the protection of the law extended only to the rights, privileges and immunities secured by the Constitution. The Act was later amended to cover rights secured by "the laws" of the United States. Section 1983 now reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> [42 *U.S.C.* § 1983 (1988).]

unwilling to protect these citizens. During debate in the House of Representatives, Mr. Beatty, a Member of Congress from Ohio, summarized the conditions that the Act was meant to address:

> Men were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent.
>
> [*Id.* at 175, 81 *S. Ct.* at 478, 5 *L. Ed.* 2d at 499 (citing Cong. Globe, 42d Cong., 1st Sess, 428).]

The Act addressed these problems in three ways; it overrode certain state laws, it provided a remedy where state law was inadequate, and it provided a federal remedy where the state remedy was adequate but unavailable in practice. *Id.* at 173-74, 81 *S. Ct.* at 477, 5 *L. Ed.* 2d at 498. As the title of the Act states, the constitutional basis of the Act was the Fourteenth Amendment. However, in the *Slaughterhouse Cases*, 83 *U.S.* (16 Wall.) 36 (1873), the Supreme Court narrowly construed the rights conferred by the Fourteenth Amendment. The Court ruled that only those rights that "owe their existence to the Federal government, its national character, its Constitution, or its laws" applied to the states by way of the Fourteenth Amendment. *Id.* at 79. Civil rights were specifically excluded from those the Court deemed subject to federal review through the Fourteenth Amendment. *Ibid.* "[S]ection 1983 . . . lay dormant as a result of restrictive judicial construction until the Supreme Court's 1961 decision in *Monroe v. Pape.*" Note, *Section 1983 and Federalism*, 90 *Harv. L. Rev.* 1133, 1135-36 (1977).

Appendix A

In *Monroe v. Pape, supra,* a husband and wife sued the City of Chicago and its police officers for a violation of their Fourth Amendment rights when the police conducted a warrantless search of their home and subjected the husband to a humiliating strip search. In finding that the local police officers were liable to the plaintiffs for their unlawful action, irrespective of an available state remedy, the Court refused to limit the Act to the circumstances described in the arguments made in favor of its passage:

> Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. . . . Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.
>
> [*Monroe, supra,* 365 *U.S.* at 183, 81 *S. Ct.* at 482, 5 *L. Ed.* 2d at 502-03.]

So well-developed a body of law has followed *Monroe* that an entire treatise is devoted to this single section of the Code. Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* (3d ed. 1991).

Ordinarily, the first task in any § 1983 action is to identify the state actor, "the person acting under color of law," that has caused the alleged deprivation. *See Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 691, 98 S. Ct. 2018, 2036,

56 *L. Ed.* 2d 611, 636 (1978). The Board does not dispute that its members were "persons acting under color of law."[2]

The second task is to identify a "right, privilege or immunity" secured to the claimant by the Constitution or other federal laws of the United States. 42 *U.S.C.* § 1983 (1988). Plaintiffs often misstate their claims by alleging a violation of § 1983 rights. Section 1983 "is not itself a source of substantive rights," but merely provides "a method of vindicating federal rights elsewhere conferred. . . . " *Baker v. McCollan*, 443 *U.S.* 137, 144 n.3, 99 *S. Ct.* 2689, 2694 n.3, 61 *L. Ed.* 2d 433, 442 n.3 (1979). We must therefore first identify the specific constitutional rights allegedly infringed.

III

SUBSTANTIVE DUE PROCESS

In this case, plaintiffs primarily assert that they have been denied their constitutionally guaranteed rights under the Fourteenth Amendment to "substantive due process" and, in the alternative, that they have been deprived of property without the "procedural due process" guaranteed by the Fourteenth Amendment.

In his concurring opinion in *Daniels v. Williams*, 474 *U.S.* 327, 106 *S. Ct.* 662, 88 *L. Ed.* 2d 662 (1986), Justice Stevens

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2. There is no issue asserted of qualified or absolute immunity for the Board members. Absolute and qualified immunity for individual state actors largely are reserved for those acting in judicial or quasi-judicial capacities. *See Butz v. Economou*, 438 *U.S.* 478, 507, 514, 98 *S. Ct.* 2894, 2911, 2915, 57 *L. Ed.* 2d 895, 916, 921 (1978); *Anastasio v. Planning Bd. of West Orange*, 209 *N.J. Super.* 499, 524 (App. Div. 1986).

explained that the Due Process Clause is the source of three different kinds of constitutional protection:

> First, it incorporates specific protections defined in the Bill of Rights. . . . Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process" [under which the State may not] take property without providing appropriate procedural safeguards.
>
> [*Id.* at 337, 106 *S. Ct.* at 677-68, 88 *L. Ed.* 2d at 672 (Stevens, J., concurring) (citation and footnotes omitted).]

Richard Arnold, Chief Judge of the Eighth Circuit Court of Appeals, has described the doctrine of substantive due process as "an oxymoron if there ever was one" and as "a linguistic monstrosity, if not a legal one." *Lemke v. Cass County*, 846 *F.*2d 469, 471 (8th Cir. 1987) (Arnold, J., concurring). In its most discredited form, the substantive due process doctrine led to the invalidation of many state and federal attempts to enact social legislation. *See, e.g., Lochner v. New York*, 198 *U.S.* 45, 64, 25 *S. Ct.* 539, 546, 49 *L. Ed.* 937, 944-45 (1905) (invalidating overtime labor law as undue interference with freedom of contract). Suffice it to observe that considerable confusion surrounds the doctrine. Michael T. Carton, Note, *25 Seton Hall*

L. Rev. 1560, 1560-61 (1995) (remarking that substantive due process analysis has resulted in "obscure and . . . contradictory holdings, widespread debate, and general perplexity").

To understand the concept of substantive due process, it is necessary to understand that prior to the application of many of the specific provisions of the Bill of Rights to the states the primary federal protection against state action was in the Due Process Clause of the Fourteenth Amendment. *See* Rosalie Berger Levinson, *Protection Against Government Abuse Of Power: Has The Court Taken The Substance Out Of Substantive Due Process*, 16 *U. Dayton L. Rev.* 313 (1991) (observing that only after gradual process of incorporation did most of provisions of Bill of Rights apply to states through Fourteenth Amendment Due Process Clause) [hereinafter Levinson]. *Rochin v. California*, 342 *U.S.* 165, 72 *S. Ct.* 205, 96 *L. Ed.* 183 (1951), is a noted example of a substantive due process violation in the preincorporation era. In *Rochin*, the Court determined that the actions of police officers in instructing a doctor to pump Rochin's stomach against his will were "so brutal and so offensive to human dignity" that they "offend[ed] a sense of justice" and resulted in denying Rochin his substantive due process rights. *Id.* at 173-74, 72 *S. Ct.* at 210, 96 *L. Ed.* at 190-91 (quotation omitted). Justice Frankfurter equated the conduct of the officers in *Rochin* with the conduct of police officers in *Malinski v. New York*, 324 *U.S.* 401, 414, 65 *S. Ct.* 781, 89 *L. Ed.* 1029, 1037 (1945), which, the Justice said, had violated "civilized standards of law." *Rochin, supra*, 342 *U.S.* at 169, 169 n.2, 72 *S. Ct.* at 208, 208 n.2, 96 *L. Ed.* at 188, 188 n.2. In its most characteristic form, substantive due process is reserved for "state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning and harmful as literally to shock the conscience of a court." *Ramos v. Gallo*, 596 *F. Supp.* 833, 837 (D. Mass. 1984).

It is to this background that we may relate the Court's statement in *Albright v. Oliver*, 510 *U.S.* __, __, 114 *S. Ct.* 807, 813, 127 *L. Ed.* 2d 114, 123-24 (1994), that, when a particular provision of the Bill of Rights "provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing th[e] claim." *Ibid.* (quotation omitted).

The Supreme Court has long hesitated to afford an overly broad reading to the substantive component of the Due Process Clause. The *Albright* decision (involving a detention based upon an unsubstantiated warrant) is only the most recent manifestation of the Court's reluctance to expand the doctrine. *See Collins v. City of Harker Heights*, 503 *U.S.* 115, 125, 112 *S. Ct.* 1061, 1068, 117 *L. Ed.* 2d 261, 273 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended.").

In the light of the clearly evident trend of the Supreme Court to limit substantive due process rights under the Fourteenth Amendment, we believe that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation.

The substantive due process doctrine "does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law." *PFZ Properties Inc. v. Rodriguez*, 928 *F.*2d 28, 31 (1st Cir.) (quotation and citations omitted), *cert. granted*, 502 *U.S.* 956, 112 *S. Ct.* 414, 116 *L. Ed.* 2d 435 (1991), *and cert. dismissed*, 503 *U.S.* 257, 112 *S. Ct.*

117 *L. Ed.* 2d 400 (1992). Rather, substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that "shock the conscience or otherwise offend . . . judicial notions of fairness . . [and that are] offensive to human dignity." *Weimer v. Amen*, 870 *F.*2d 1400, 1405 (8th Cir. 1989) (quotations omitted). With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked. *See Irvine v. California*, 347 *U.S.* 128, 133, 74 *S. Ct.* 381, 384, 98 *L. Ed.* 561, 569 (1954) (finding no Fourteenth Amendment violation when state police officers broke into defendant's home and secretly placed a microphone in defendant's bedroom, as the trespass involved no coercion, violence or brutality to the defendant). Recall that in *Rochin* Justice Frankfurter had equated substantive due process violations with governmental abuses that "are . . . too close to the rack and the screw to permit of constitutional differentiation." *Rochin, supra*, 342 *U.S.* at 172, 72 *S. Ct.* at 210, 96 *L. Ed.* at 190. The conduct of an errant board member who berated an applicant and brought in facts outside the record at a rent proceeding in violation of acceptable board practice does not rise to the level of a substantive due process violation under the Supreme Court's standards.

In *Creative Environments, Inc. v. Estabrook*, 680 *F.*2d 822 (1st Cir.), *cert. denied*, 459 *U.S.* 989, 103 *S. Ct.* 345, 74 *L. Ed.* 2d 385 (1982), the First Circuit Court of Appeals rejected a real estate developer's claim that a municipal planning board deprived the corporation of its substantive due process rights under the Fourteenth Amendment. The corporation alleged a conspiracy by the planning board to deny the corporation's subdivision plan. It based its conspiracy theory upon the town's "overall distortion of the existing statutory and regulatory

scheme . . . [and] arbitrary misapplication of state law." *Id.* at 831.

While acknowledging that "it [was] not impossible to derive a theoretical basis for [the corporation's substantive due process] argument" from certain Supreme Court cases, the court nevertheless observed that

> were such a theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.
>
> [*Ibid.*]

The *Creative* court acknowledged that official misconduct that deprives one of a property interest may rise to the level of a substantive due process violation in limited instances, as when a government body's actions are motivated by racial animus or political or personal bias, but that the corporation in *Creative* had not alleged such abuse. *Id.* at 832 (citing *Progress Dev. Corp. v. Mitchell*, 286 *F.*2d 222 (7th Cir. 1961) (racial animus); *Cordeco Dev. Corp. v. Santiago Vasquez*, 539 *F.*2d 256 (1st Cir.) (personal and political bias), *cert. denied*, 429 *U.S.* 978. *S. Ct.* 488, 50 *L.*

Ed. 2d 586 (1976)). The court concluded its substantive due process analysis by noting that

> [t]he authority cited by [the corporation], as well as other cases, all suggest that the conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate.... Every appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse . . . reason.
>
> [*Id.* at 833 (quotation, citation and footnote omitted).][3]

Other federal circuits have found that when property rights are denied in the course of conventional municipal decisionmaking there is no substantive due process violation.

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3. A corollary to the holding in *Albright v. Oliver, supra*, is that the Supreme Court will presumably use equal protection analysis to resolve racial animus cases in the future.

See Chesterfield Dev. Corp. v. City of Chesterfield, 963 *F.*2d 1102 (8th Cir. 1992) (determining that city's bad-faith violation of state law in enforcing invalid zoning plan against development remains violation of state law and does not give rise to substantive due process violation); *Harding v. County of Door*, 870 *F.*2d 430, 431-32 (7th Cir.) (finding no substantive due process violation when county revoked building permit after construction of housing project had commenced, notwithstanding that state reviewing court had determined the action to be illegal), *cert. denied*, 493 *U.S.* 853, 110 S. *Ct.* 154, 107 *L. Ed.* 2d 112 (1989).

Even though the Rent Leveling Board may have violated its own standards of governance by allowing a member with a demonstrated bias to participate in the hearings, we believe that such governmental action does not give rise to a substantive due process claim.

We acknowledge that the standard that we adopt today may be contrary to a more expansive interpretation given the Due Process Clause by many circuit courts, which have found that "arbitrary or irrational" government actions deny substantive due process rights. *See, e.g., DeBlasio v. Zoning Bd. of Adjustment*, 53 *F.*3d 592, 593 (3d Cir.) (concluding that "in the context of land use regulation, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached"), *cert. denied*, __ *U.S.* __, 116 *S. Ct.* 352, 133 *L. Ed.* 2d 247 (1995); *Del Monte Dunes v. City of Monterey*, 920 *F.*2d 1496, 1508 (9th Cir. 1990) (citations omitted) ("[T]o establish their substantive due process claim, appellants must show that the City's decision to deny tentative map approval and to refuse an extension of the conditional use permit was arbitrary and irrational"); *Brady v. Town of Colchester*, 863 *F.*2d 205, 215

(2d Cir. 1988) (declaring that substantive due process assures property owner's right to be free from arbitrary or irrational zoning actions); *Bello v. Walker*, 840 *F.*2d 1124, 1129 (3d Cir.) (determining that substantive due process rights may be violated when municipal council arbitrarily and irrationally interferes with building permit process), *cert. denied*, 488 *U.S.* 851, 109 *S. Ct.* 134, 102 *L. Ed.* 2d 107, *and cert. denied*, 488 *U.S.* 868, 109 *S. Ct.* 176, 102 *L. Ed.* 2d 145 (1988); *Scott v. Greenville County*, 716 *F.*2d 1409, 1419 (4th Cir. 1983) ("Arbitrariness, abuse of discretion, caprice or unfairness giv[e] rise to a constitutional claim [of denial of substantive due process in state permit processing actions]").

It is a mistake, however, to equate the concept of "arbitrary and irrational" governmental land use decisions with the substantive component of the Due Process Clause of the Fourteenth Amendment. In the land use context, the phrases "arbitrary and irrational" or "capricious" are often shorthand expressions for a standard of review that asks whether there are sufficient facts in the record to support the agency's action or whether the agency has followed its legislative mandate. *Bow & Arrow Manor v. Town of West Orange*, 63 *N.J.* 335, 343 (1973).

In *Anastasio v. Planning Bd. of West Orange*, 209 *N.J. Super.* 499, 521-22, *certif. denied*, 107 *N.J.* 46, (1986), the Appellate Division expressly declined to find a due process violation and award damages under § 1983 because a township planning board's rejection of a real estate developer's application for a development plan "was arbitrary and capricious."[4] The *Anastasio* court observed that

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4. We are aware that *Gregg v. Township Comm. of Hazlet*, 232 *N.J. Super.* 34 (App. Div. 1989), suggests that a § 1983 claim arises when a public body abuses its authority. However, *Gregg* did not address the standards for (Cont'd)

> [f]requently in our law a court on an appeal from action of a public agency will determine if the agency acted arbitrarily or capriciously. Accordingly while the words "arbitrary and capricious" may sound harsh, they are simply the standard of appellate review in particular cases.
>
> [*Id.* at 522 (citations omitted).]

See also Silverman v. Rent Leveling Bd., 277 *N.J. Super.* 524, 538 (App. Div. 1994) (agreeing that it would be improper to hold municipal agency liable under § 1983 merely for mistakenly exercising power under state law), *certif. denied*, 139 *N.J.* 443 (1995). It is for this reason that Chief Judge Arnold cautioned that substantive due process protections should be reserved for "truly irrational" governmental abuses that bear no relationship to the merits of the pending matter. Judge Arnold offers as an example of such truly irrational conduct a governmental body that "flips a coin" to make a decision. *Lemke, supra*, 846 *F.*2d at 472 (Arnold, J., concurring). Although Baltarzuk's conduct during the rent proceedings may have violated some state law, it was not "truly irrational." Baltarzuk appears to have mistakenly believed that it was his duty to serve as a tenants' advocate. From this mistaken premise, Baltarzuk's actions were rational. Moreover, all of Baltarzuk's actions were related to the merits of the rent proceeding. The Board's original determinations about the eligibility, as capital improvements, of things such as a "Bob-

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(Cont'd)

establishing a § 1983 due process violation in the land use context because the township had conceded on appeal that plaintiff had established such a violation. *Id.* at 37. Rather, *Gregg* addressed the standards for granting attorney fees under 42 *U.S.C.* § 1988 after a constitutional violation has been established.

Cat" loader were at least debatable. And Baltarzuk was correct that the base rent of one of the tenants was misstated.

We believe that the contrary decisions (giving broad reach to the doctrine of substantive due process) limit their focus to the words of the Supreme Court that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government," *Daniels, supra,* 474 *U.S.* at 331, 106 *S. Ct.* at 665, 88 *L. Ed.* 2d at 668 (quotations omitted), without considering the degree of the abuse of power that must be displayed before invoking the substantive component of that particular clause. *Irvine, supra,* 347 U.S. at 133, 74 *S. Ct.* at 383, 98 *L. Ed.* at 569.

"The lower courts' differing approaches to the treatment of substantive due process in these areas suggest the obvious need for Supreme Court clarification." Levinson, *supra,* 16 *U. Dayton L. Rev.* at 318. Until that clarification, however, we seriously doubt that the Supreme Court will find a substantive due process violation to exist when a governmental body denies a property right by conduct that is "arbitrary or irrational" under state law but neither shocking to the conscience of a court in the sense of being a departure from civilized norms of governance, nor offensive to human dignity. *See Rochin, supra,* 342 *U.S.* at 172-174, 72 *S. Ct.* at 210, 96 *L. Ed.* at 190-91.

IV

PROCEDURAL DUE PROCESS

A. *Parratt* Doctrine

Analytically, the Rivkins' case is much closer to a procedural due process claim. Plaintiffs contend that the

presence of a tainted board member deprived them of property, a fair rate of return on their investment, without due process of law. Their case amounts to an allegation that the State failed to furnish an impartial tribunal, which "is a matter of procedural, not substantive, due process." *Holloway v. Walker,* 784 *F.*2d 1287, 1293 (5th Cir.), *cert. denied,* 479 *U.S.* 984, 107 *S. Ct.* 571, 93 *L. Ed.* 2d 576 (1986); *accord Marshall v. Jerrico, Inc.*, 446 *U.S.* 238, 242, 100 *S. Ct.* 1610, 1613, 64 *L. Ed.* 2d 182, 188 (1980) (stating that "requirement of neutrality in adjudicative proceedings safeguards the . . . concerns of procedural due process").

The trial court and Appellate Division found that Baltarzuk tainted the deliberations of the Board by participating in the hearings with a preconceived bias against the Rivkins' application, behaving as an advocate for the tenants during the hearing, and relying on evidence outside the record. *Rivkin, supra,* 277 *N.J. Super.* at 561. Although Baltarzuk maintained that he was not prejudiced and should not have been disqualified, we accept the lower courts' findings for purposes of this appeal. More is required to sustain a claim under 42 *U.S.C.* § 1983, however, than a demonstration that a partial board member participated in the regulatory proceedings. *Parratt, supra,* held that "for a deprivation of property to violate the Due Process Clause of the Fourteenth Amendment it must occur without the opportunity to be heard at a meaningful time and in a meaningful manner." Karen M. Blum, *Applying the* Parratt/Hudson *Doctrine*: *Defining the Scope of the Logan Established State Procedure Exception and Determining the Adequacy of State Postdeprivation Remedies*, 13 *Hastings Const. L.Q.* 695, 698-99 (1986) [hereinafter Blum]. (Parts of *Parratt* not relevant here were overruled by *Daniels v. Williams, supra,* 474 *U.S.* 327, 106 *S. Ct.* 662, 88 *L. Ed.* 2d 662 (1986).) To avoid violating the Due

Process Clause, the State must have afforded the Rivkins a fair hearing on their claims at a meaningful time.

While it is preferable for states to provide a predeprivation hearing whenever practicable, the Supreme Court has "rejected the proposition that 'at a meaningful time and in a meaningful manner' *always* requires the State to provide a hearing prior to the initial deprivation of property." *Parratt, supra*, 451 *U.S.* at 540, 101 *S. Ct.* at 1915, 68 *L. Ed.* 2d at 432 (footnote omitted). At times, for a state to provide any meaningful pre-deprivation process simply may not be possible. Such circumstances arise if a state must take immediate action or if the loss of property is caused by the unpredictable conduct of state officials. *Watts v. Burkhart*, 854 *F.*2d 839, 842 (6th Cir. 1988). The Supreme Court has acknowledged that

> the timing and nature of the required hearing "will depend on the appropriate accommodation of the competing interests involved." These include the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved.
>
> [*Logan v. Zimmerman Brush Co.*, 455 *U.S.* 422, 434, 102 *S. Ct.* 1148, 1157, 71 *L. Ed.* 2d 265, 277 (1982) (citations and footnote omitted).]

Post-deprivation remedies are most likely to be deemed satisfactory substitutes for pre-deprivation process when a meaningful pre-deprivation hearing is impracticable, and

property rather than a life or liberty interest is at stake. *See* Blum, *supra*, 13 *Hastings Const. L.O.* at 699-700. *Parratt v. Taylor* illustrates the point. That case involved an inmate at a Nebraska prison who ordered a hobby kit valued at $23.50. The kit was lost after being delivered to the prison. The inmate brought suit in the United States District Court under § 1983, claiming that he had been deprived of his property without due process of law. *Parratt, supra*, 451 *U.S.* at 529, 101 *S. Ct.* at 1910, 68 *L. Ed.* 2d at 425. The district court granted summary judgment in favor of the inmate and the Eighth Circuit affirmed. In reversing these lower court decisions, the Supreme Court asserted that accepting plaintiff's position would turn every alleged injury inflicted by a state official acting under color of law into a violation of the Fourteenth Amendment cognizable under § 1983. *Parratt, supra*, 451 *U.S.* at 544, 101 *S. Ct.* at 1917, 68 *L. Ed.* 2d at 434.

The Supreme Court fit *Parratt* within the framework of cases in which pre-deprivation process was impracticable because the plaintiff was deprived of property as the result of a random and unauthorized act of a state employee. "In such a case, the loss is not a result of some established state procedure and the state cannot predict precisely when the loss will occur." *Id.* at 541, 101 *S. Ct.* at 1916, 68 *L. Ed.* 2d at 432. Thus, an adequate postdeprivation hearing will satisfy the requirements of the Due Process Clause. *Hudson v. Palmer*, 468 *U.S.* 517, 104 *S. Ct.* 3194, 82 *L. Ed.* 2d 393 (1984), reaffirmed *Parratt* and extended this post-deprivation doctrine to cases involving the intentional deprivation of property by a state official. The Court held that an inmate whose personal property was intentionally destroyed by a corrections officer during a search for contraband could not sustain a § 1983 claim because adequate state tort remedies were available to redress the deprivation.

Appendix A

The *Parratt* doctrine does not apply — and predeprivation process is required- when deprivations without procedural fairness are predictable in nature. Frederic S. Schwartz, *The Postdeprivation Remedy Doctrine of* Parratt v. Taylor *and its Application to Cases of Land Use Regulation*, 21 *Ga. L. Rev.* 601, 607 (1987) [hereinafter Schwartz]. In *Logan v. Zimmerman Brush Co.*, 455 *U.S.* 422, 102 *S. Ct.* 1148, 71 *L. Ed.* 2d 265 (1982), plaintiff's employment discrimination claim expired without notice to him when the Illinois Fair Employment Practices Commission failed to convene a fact-finding conference within the 120-day period mandated by Illinois law. Plaintiff brought suit under § 1983, asserting that the state's inaction denied him his constitutional right to due process. The Supreme Court held that the existence of a postdeprivation state remedy — there, an independent tort action — is constitutionally inadequate when the deprivation of property results from an established state procedure. The Court stated:

> It is the state system itself that destroys a claimant's property interest, by operation of law, whenever the Commission fails to convene a timely conference. . . . Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.
>
> [*Logan, supra*, 455 *U.S.* at 436, 102 *S. Ct.* at 1158, 71 *L. Ed.* 2d at 278.]

Thus, a threshold question in any procedural due process case is whether the deprivation was caused by random and unauthorized conduct or whether it resulted from an established state procedure.

Appendix A

The Appellate Division held that Baltarzuk's actions as a member of the Rent Leveling Board constituted random and unauthorized conduct within the meaning of the *Parratt* doctrine. That characterization applies to behavior of state officials that is not reasonably anticipated, and therefore cannot practicably be addressed by the provision of pre-deprivation remedies. The Supreme Court's decision in *Zinermon v. Burch*, 494 *U.S.* 113, 110 *S. Ct.* 975, 108 *L. Ed.* 2d 100 (1990), explains the concepts. In *Zinermon*, the Court held that the *Parratt* doctrine did not serve to bar plaintiff's claim that his due process rights were violated when state officials admitted him to a state mental hospital as a voluntary patient even though he was incompetent to give informed consent to his admission. Because the flaw in Florida's procedure (permitting an incompetent to commit himself) was a structural one that the government could clearly anticipate, plaintiff's claim fit within the *Logan* doctrine rather than the *Parratt/Hudson* doctrine. Thus, the availability of postdeprivation process did not serve to defeat plaintiff's § 1983 claim.

The Rivkins maintain that even if Baltarzuk's actions were random and unauthorized, and therefore unpredictable, the Rent Leveling Board's were not. They contend that the Board as policy-maker established the deficient state procedures by permitting Baltarzuk to participate in the hearing even after he had demonstrated an inability to act impartially. This Board conduct would, in their view, obviate the need to conduct a Parratt analysis by placing the case within the *Logan/Zinermon* framework.

Although New Jersey law does proscribe conflicts of interest on the part of public officials, the assumption of our law is that members will disqualify themselves, not that a municipal board will act affirmatively to disqualify its own members.

Appendix A

> Whenever a substantial question is raised as to the disinterestedness of one of several officials sitting on a matter, and the other officials can take care of the case, it usually is just as well for the official in question to withdraw therefrom, so that not the faintest shadow be cast on the integrity of the determination.
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> [*Hochberg v. Freehold Racing Ass'n*, 40 *N.J. Super.* 276, 284 (App. Div. 1956).]

See Griggs v. Princeton Borough, 33 *N.J.* 207, 222 (1960) (setting aside planning board's actions because board member's employer had financial interest in decisions of board). In the Rivkins' case, one Board member did disqualify himself when the Board attorney pointed out a possible conflict. The Board attorney did attempt to chasten Baltarzuk. In response, he stoutly maintained that he was not biased, and was simply conducting a searching investigation of the case — "just asking for correct figures."

Moreover, the available federal precedent does not draw this proffered distinction between Baltarzuk's conduct and the Board's collective conduct and thereby remove the case from the strictures of the *Parratt* doctrine. Recall that in *Logan* the Court stated, "Logan is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." *Logan, supra*, 455 *U.S.* at 436, 102 *S. Ct.* at 1158, 71 *L. Ed.* 2d at 278. To hold that the Board's error created an established state procedure would "convert every departure from established administrative procedures into a violation of the Fourteenth Amendment, cognizable under § 1983." *PFZ Properties, supra*, 928 *F.*2d at 31.

Admittedly, the analogy to *Parratt* is not perfect. *Parratt* involved the conduct of a state employee — this case involves the conduct of a public board or body that is, in itself, an organ of state government. Nor does this case involve a denial of a predeprivation hearing — there was a pre-deprivation hearing but that hearing was flawed. Still we believe that the analogy to *Parratt* is appropriate. "The requirements of procedural due process are 'norms addressed to legal systems as a whole rather than to individual government actors.' " Schwartz, *supra*, 21 *Ga. L. Rev.* at 611 (quoting Laurence H. Tribe, *American Constitutional Law* § 18-4, at 1162 n.15 (1st ed. 1978)). "Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon, supra*, 494 *U.S.* at 126, 110 *S. Ct.* at 983, 108 *L. Ed.* 2d at 114. We must look at the legal system as a whole.

Amicus Hudson County Taxpayers' Association acknowledges that most municipal boards are comprised of inexpert, part-time laypersons who operate in a highly charged political atmosphere. As a result, judicial review is an integral part of the State's governance of its local boards and bodies. For reasons discussed more fully in Part B hereof, the New Jersey Constitution guarantees government under law at the local level. This is especially true in the context of land use law in which judicial review ensures full accountability. The qualitative difference between procedural unfairness in a case such as this and that in *Logan* and *Zinermon* is that the state action in those cases was both institutional (the procedures were built-in) and final (in *Logan*, plaintiff's lawsuit "was forever barred"; in *Zinermon*, the patient's liberty was irretrievably lost).

And even though the ordinance creating the Rent Leveling

Board calls for the participation of a tenant representative, this State system itself neither caused the deprivation of the Rivkins' property nor itself amounts to a per se violation of the Rivkins' procedural due process rights. In fact, the ordinance requires the Board to base its determination on the reasonable, credible evidence before it. Rather, it was the unpredictable behavior of the tenant representative, which went well beyond the bounds contemplated by the ordinance, that spawned the Rivkins' problems. When Baltarzuk tainted the Board's proceedings by behaving as a tenant advocate and introducing evidence from outside the record, he was acting on his own initiative without State authorization. The State is not required to anticipate random and unauthorized violations of its own constitutionally adequate procedures. *PFZ Properties, supra,* 928 *F.*2d at 31. Nor may a state effectively anticipate random and unauthorized violations of established state procedures by its lesser boards or bodies in the land use context. Thus, the deprivation—the delay in receiving a fair rental allowance — will not be deemed to be in violation of the Due Process Clause if adequate postdeprivation remedies were available to the Rivkins. *Parratt, supra,* 451 *U.S.* at 539, 101 *S. Ct.* at 1915, 94 *L. Ed.* 2d at 431.

B. Adequacy of Plaintiffs' Remedy

The post-deprivation remedy that the State furnished to the Rivkins was an action in lieu of prerogative writs. The 1947 New Jersey Constitution preserved the substance of common law prerogative writ review by permitting parties to seek "review, hearing and relief" in the Superior Court of all actions of municipal agencies. *N.J. Const.* art. VI, § 5, ¶ 4. New Jersey Court *Rule* 4:69 implements this constitutional provision. A court may set aside a municipal board decision if it is shown to be arbitrary, capricious or unreasonable, not supported in the

evidence, or otherwise contrary to law. *Reid v. Township of Hazlet*, 198 *N.J. Super.* 229 (App. Div.), *certif. denied*, 101 *N.J.* 262 (1985); *Green Acres of Verona v. Borough of Verona*, 146 *N.J. Super.* 468, 470 (App. Div. 1977).

Plaintiffs contend that the action in lieu of prerogative writs is not an adequate remedy because it does not enable them to recover damages, attorney's fees or costs. In *Parratt*, the Court concluded, "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Parratt, supra*, 451 *U.S.* at 544, 101 *S. Ct.* at 1917, 68 *L. Ed.* 2d at 434. *Accord Ayers v. Jackson Township*, 202 *N.J. Super.* 106, 128-29 (App. Div. 1985) ("[A] state remedy may be sufficient, even if not as complete as that allowed under 42 *U.S.C.* § 1983."), *aff'd in part and rev'd in part*, 106 *N.J.* 557 (1987).

Plaintiffs' action in lieu of prerogative writs provided an adequate state post-deprivation remedy as required by the *Parratt* doctrine. The remedies provided were quite complete. After reviewing the proceedings and decision of the Rent Leveling Board, the trial court found that Baltarzuk's improper conduct had prejudiced the Rivkins. The court remanded for a new hearing and barred Baltarzuk from participating in the case. After rehearing the matter, the Board awarded plaintiffs an additional $25,089.67 in qualifying capital improvements. The total of the two sums approved by the Board amounted to 77 per cent of the Rivkins' original request. The additional rent increase redressed all of the economic claims that plaintiffs possessed. In a second prerogative writ action, the trial court upheld the action of the Dover Board as a fair and reasonable assessment of the

proofs. As the Third Circuit concluded in a case in which plaintiff ultimately received its desired dance hall license through the appeal process, "[D]elay alone does not [ordinarily] create a procedural due process violation." *Midnight Sessions Ltd. v. City of Philadelphia*, 945 *F.*2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 *U.S.* 984, 112 *S. Ct.* 1668, 118 *L. Ed.* 2d 389 (1992).

The remaining question is whether the absence of a specific provision authorizing attorney's fees to prevailing parties in prerogative writ actions causes the state remedy to be constitutionally inadequate. *Parratt* makes clear that state remedies need not provide all the relief that would have been available if the plaintiff were successful under § 1983. Thus, the state remedies would not be considered inadequate simply because they did not allow for the recovery of attorney's fees. *Weimer v. Amen*, 870 *F.*2d 1400, 1405 (8th Cir. 1989); *Wilson v. Beebe*, 770 *F.*2d 578, 584 (6th Cir. 1985).[5]

In addition, New Jersey has recently increased judicial authority to allow counsel fees to the prevailing party in a civil action. *N.J.S.A.* 2A:15-59.1. While we do not decide the issue in this case, it appears a permissible interpretation to conclude that a court may award counsel fees to the prevailing party when a local board "without any reasonable basis in law or equity" refuses to accede to a clearly meritorious appeal. *Ibid.* A proposed Rule of Court would supplement the relief provided in

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5. This case illustrates again the "difficulty that local agencies and reviewing courts have experienced in the administration of rent control ordinances." *Mayes v. Jackson Township Rent Leveling Bd.*, 103 *N.J.* 362, 376 (1986), *cert. denied*, 479 *U.S.* 1090, 107 *S. Ct.* 1300, 94 *L. Ed.* 2d 155 (1987). A system of laws under which a party spends over $50,000 in legal fees to obtain a $59,000 rent adjustment seems a poor method of protecting the public. (The trial court allowed only $39,000 of those fees.)

the statute. *See Proposed Rule Amendment on Frivolous Litigation*, 143 *N.J.L.J.* 370 (Jan. 29, 1996).

Because the State provided an adequate post-deprivation remedy to redress the aberrant conduct of the board member or the Board, plaintiffs' rights to procedural due process were not violated. Therefore, plaintiffs cannot sustain an action on that basis for damages and attorney's fees under § 1983.

V

EQUAL PROTECTION

We here come to the analysis that may best reflect the core values of 42 *U.S.C.* § 1983. Obviously, claimants may not escape the teaching of *Parratt* and *Hudson* by relabeling procedural due process claims as equal protection claims. In his concurring opinion in *Albright*, Justice Kennedy cautioned against allowing *Parratt* to be diluted and, in some respects, circumvented by such pleading exercises. *Albright, supra*, 510 *U.S.* at __, 114 *S. Ct.* at 819, 127 *L. Ed.* 2d at 131.

> It is not enough simply to give these state law claims labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution."
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> [*Creative Environments, supra*, 680 *F.*2d at 833 (citations omitted).]

Section 1983's powerful remedy should be reserved for claims involving "gross abuse of power, invidious discrimination, or fundamentally unfair procedures." *Id.* at 832 n.9. Proving a deprivation of equal protection rights in a dispute with a municipal agency requires a distinct measure of proof. The majesty of the Equal Protection Clause should not be invoked every time that applications are incorrectly denied by a municipal agency.

> If disgruntled permit applicants could create constitutional claims merely by alleging that they were treated differently from a similarly situated applicant, the correctness of virtually any state permit denial would become subject to litigation in federal court. Limiting such claims is essential to prevent federal courts from turning into "zoning board[s] of appeals." *Village of Belle Terre v. Boraas*, 416 *U.S.* 1, 12, 94 *S. Ct.* 1536, 1542, 39 *L. Ed.* 2d 797 (1974) (Marshall, J., dissenting).
>
> [*Nestor Colon Medina & Sucesores Inc. v. Custodio*, 964 *F.*2d 32, 44-45 (1st Cir. 1992).]

Ordinarily, an equal protection plaintiff must be singled out because of membership in a class and cannot be just the victim of a random act of governmental incompetence. Furthermore, "the state's act of singling out an individual for differential treatment does not itself create the class [as that] would make . . . every arbitrary act of government[ ] a violation of the Constitution." *Albright v. Oliver*, 975 *F.*2d 343, 348 (7th Cir. 1992), *aff'd on other grounds*, 510 *U.S.* __, 114 *S. Ct.* 807, 127 *L. Ed.* 2d 114

(1994). Therefore, successful equal protection claimants usually demonstrate purposeful discrimination based on membership in a protected class, such as race. For example, in *Wilson v. City of North Little Rock*, 801 *F.*2d 316 (8th Cir. 1986), the court reinstated plaintiff's equal protection claim against police officers who allegedly set up roadblocks and harassed black patrons of plaintiff's roller skating rink. *See also Watts v. Burkhart, supra*, 854 *F.*2d at 849 (Nelson, J., concurring) ("To turn the laws against a person because of his race, as the [medical] board members are said to have done here, is to deny that person the equal protection of the laws. . . . ").

Similarly, discrimination on the basis of political beliefs may give rise to a First Amendment claim. *See Elrod v. Burns*, 427 *U.S.* 347, 96 *S. Ct.* 2673, 49 *L. Ed.* 2d 547 (1976) (government interference with property right in form of one's employment in retaliation for exercise of one's First Amendment rights is actionable under § 1983).

VI

CONCLUSION

To sum up, the Act of 1871 was a response to a profound breakdown in state government. Congress guaranteed by Section 1 of the Act that every person should have a federal remedy for failure of any state actor to afford a person the rights, privileges and immunities secured by the Constitution and laws of the United States.

Among the rights secured by the Fourteenth Amendment is that no state shall deprive a person of property without due process of law, nor deny to that person the equal protection of the

laws. In the setting of municipal land use controversies, our State has well established procedures, including judicial review of municipal governance, to assure government under law. *See Pizzo Mantin Group v. Township of Randolph,* 137 *N.J.* 216 (1994) (holding that municipal government may not exercise unguided developmental powers but must incorporate standards of decision in duly-enacted ordinances).

We are satisfied that the principles of *Parratt* and *Hudson* provide an appropriate basis for concluding that plaintiffs were not deprived of property without the due process of law guaranteed by the Fourteenth Amendment. Generally, litigants need not exhaust their state administrative or judicial remedies before bringing a § 1983 claim. *Patsy v. Florida Bd. of Regents,* 457 *U.S.* 496, 102 *S. Ct.* 2557, 73 *L. Ed.* 2d 172 (1982); *Monroe v. Pape, supra,* 365 *U.S.* 167, 81 *S. Ct.* 473, 5 *L. Ed.* 2d 492 (1961). However, as applied to municipal land use cases, the *Parratt* doctrine is an analog to the familiar doctrine of ripeness. In *Williamson Planning Comm'n v. Hamilton Bank,* 473 *U.S.* 172, 195, 105 *S. Ct.* 3108, 3121, 87 *L. Ed.* 2d 126, 144 (1985), the Court stated, "The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt.*" Unlike other constitutional violations that are complete at the moment they occur, a deprivation of property without procedural due process does not arise until the plaintiffs are actually denied appropriate procedures for redress in the state system. *Gilmere v. City of Atlanta,* 774 *F.*2d 1495, 1499 (11th Cir. 1985) (citing *Parratt, supra,* 451 *U.S.* at 541-44, 101 *S. Ct.* at 1916-17), *cert. denied,* 476 *U.S.* 1115, 106 *S. Ct.* 1970, 90 *L. Ed.* 2d 654 (1986). In *MacDonald, Sommer & Frates v. Yolo County,* 477 *U.S.* 340,

348, 106 *S. Ct.* 2561, 2566, 91 *L. Ed.* 2d 285, 294 (1986), the Court held that a planning commission's decision to deny plaintiff's subdivision proposal may amount to a taking if it goes "too far," but said that a court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." By analogy, the claim that property has been taken by a rent leveling board without procedural due process cannot be known until the process is complete.

We are thus satisfied that the *Parratt* doctrine provides an appropriate basis for dismissing plaintiffs' procedural due process claim. Professor Fallon suggests that it would be preferable to view "*Parratt* as implementing a species of abstention doctrine [because it] would put the arguments for requiring litigants to proceed in state court into honest view, where they could be evaluated by commentators and by Congress." Richard H. Fallon, *Some Confusions About Due Process Judicial Review and Constitutional Remedies*, 93 *Colum. L. Rev.* 309, 345-46 (1993) (footnote omitted). As it stands now, "[t]he common sense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. " *Albright, supra*, 510 *U.S.* at __, 114 *S. Ct.* at 818, 127 *L. Ed.* 2d at 130 (Kennedy, J., concurring). So long as state legal systems remain committed to principles of equal justice and provide plain and adequate remedies to prevent unconstitutional deprivations of property, there is no occasion for plaintiffs to seek redress in federal court or under federal law. Unless a substantial federal question is shown, land use decisions should "properly rest with the community that is ultimately — and intimately — affected." *Gardner v. Baltimore Mayor & City Council*, 969 *F.*2d 63, 68 (4th Cir. 1992).

When, however, a government agency has engaged in egregious misconduct rising to the level of a substantive due process violation or has invidiously discriminated against a member of society, a § 1983 violation occurs "regardless of the fairness of the procedures used to implement" the abuse. *Daniels v. Williams, supra,* 474 *U.S.* at 331, 106 *S. Ct.* at 665, 88 *L. Ed.* 2d at 668. Very often, conduct of that nature may violate other provisions of the federal Civil Rights Act, such as 42 *U.S.C.* § 1981, or our own Law Against Discrimination, *N.J.S.A.* 10:5-1 to 10:5-42. In this case, the conduct of Mr. Baltarzuk may have been ill-tempered, or even rude, but there is not a shred of evidence that he bore any resentment against the Rivkins on account of political, racial or religious affiliations. The grievances between the Rivkins and Baltarzuk and the Board, as in almost every such local controversy, were all economic. Perhaps Baltarzuk's disqualification should have occurred at an earlier stage. Still, disputes about the regularity of state procedures do not represent the type of egregious conduct that rises to the level of a substantive due process violation.

In *Fair Assessment in Real Estate v. McNary,* 454 *U.S.* 100, 102 *S. Ct.* 177, 70 *L. Ed.* 2d 271 (1981), the principles of which infuse our decision today in *General Motors v. Linden, supra,* Justice Rehnquist wrote:

> To allow such suits [§ 1983 actions for improper tax assessments] . . . merely on the assertion that the tax collected was willfully and maliciously discriminatory against a certain type of property . . . would result in this Court being a source of appellate review of all state property tax classifications.
>
> . . . .

> [Such interference with state systems would be contrary to] the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts.
>
> . . . .
>
> [Aggrieved parties] must seek protection of their federal rights by state remedies, provided . . . that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.
>
> [*Id.* at 114-16, 102 *S. Ct.* at 185-86, 70 *L. Ed.* 2d at 282-83 (quotations, citations and footnote omitted).]

Of course, as do we, Justice Rehnquist excepted from this categorization cases of invidious discrimination based upon classifications such as race. *Id.* at 107 n. 4, 102 *S. Ct.* at 181 n. 4, 70 *L. Ed.* 2d at 278 n. 4.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE WILENTZ and JUSTICES HANDLER, POLLOCK, GARIBALDI, STEIN and COLEMAN join in JUSTICE O'HERN's opinion.

APPENDIX B — OPINION AND DECISION OF THE SUPERIOR COURT OF NEW JERSEY FOR THE APPELLATE DIVISION DATED DECEMBER 8, 1994

649 A.2d 1356

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, T/A GALAXY MANOR, A NEW JERSEY PARTNERSHIP, PLAINTIFFS-RESPONDENTS AND CROSS-APPELLANTS, v. DOVER TOWNSHIP RENT LEVELING BOARD, DEFENDANT-APPELLANT AND CROSS-RESPONDENT.

Superior Court of New Jersey
Appellate Division

Argued October 5, 1994 Decided December 8, 1994.

* * *

Before Judges KING, D'ANNUNZIO and EICHEN.

Courtland T. Babcock, II, argued the cause for appellant/cross-respondent (*Babcock, Hennes & Bielory*, attorneys; *Mr. Babcock* on the brief).

Reuel E. Topas argued the cause for respondents/cross-appellants (*Levin, Shea, Pfeffer, McMahon* and *Russell*, attorneys; *Mr. Topas*, on the brief).

The opinion of the court was delivered by

D'ANNUNZIO, J.A.D.

The issue is whether defendant deprived plaintiffs of procedural due process, thereby subjecting defendant to liability for compensatory damages and counsel fees.

Appendix B

Galaxy Manor, a partnership, operates a mobile home park in Dover Township. In May 1990, it filed an application for a rent increase with defendant Dover Township Rent Leveling Board (Board or defendant). The application was based on major capital improvements to the park, allegedly in the amount of $59,624.96. The Board conducted hearings and rendered its decision in October 1990, permitting rent increases based on capital improvements in the amount of $20,641.42.

Plaintiffs, the partners in Galaxy, filed this action in lieu of prerogative writs, contending that the defendant's determination was arbitrary and capricious and alleging a violation of their civil rights contrary to 42 *U.S.C.A* § 1983.[1] The core of plaintiffs' allegations focused on the behavior of Edward Baltarzuk, a member of the Board. Plaintiffs contended that Baltarzuk participated in the hearings with a preconceived bias against their application, behaved as an advocate for the tenants during the hearing, relied on evidence outside the record and poisoned the deliberations of the Board.

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1. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix B

In the prerogative writ aspect of plaintiffs' case, the trial court ruled that Baltarzuk had prejudiced plaintiffs. The court set aside the Board's determination, remanded for a new hearing and barred Baltarzuk from participating as a Board member at the new hearing. On remand, the Board allowed an additional $25,089.67 in qualifying capital improvements.

Based on a finding that Baltarzuk's behavior had violated plaintiffs' civil rights contrary to § 1983, the court awarded counsel fees to plaintiffs pursuant to 42 *U.S.C.A.* § 1988 in the amount of $39,679.55. The court also awarded plaintiffs compensatory damages in the amount of $6,303.34, representing interest on the difference between the initial rent increase and the larger rent increase awarded as a result of the hearing on remand. Defendant appealed, and plaintiffs cross-appealed.

Plaintiffs contended, and the trial court agreed, that Baltarzuk's performance as a Board member deprived them of procedural due process. *See Marshall v. Jerrico, Inc.*, 446 *U.S.* 238, 242, 100 *S.Ct.* 1610, 1613, 64 *L.Ed.*2d 182, 188 (1980) (entitlement to an impartial tribunal is a procedural due process right). We conclude that even if Baltarzuk's behavior deprived plaintiffs of due process, plaintiffs had an adequate postdeprivation remedy under State law and, therefore, § 1983 was not violated.

Parratt v. Taylor, 451 *U.S.* 527, 101 *S.Ct.* 1908, 68 *L.Ed.*2d 420 (1981)[2] involved a claim by a Nebraska inmate that prison

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2. In *Daniels v. Williams*, 474 *U.S.* 327, 106 *S.Ct.* 662, 88 *L.Ed.*2d 662 (1986), the Supreme Court partially overruled *Parratt* when it held that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property." *Id.* at 328, 106 *S.Ct.* at 663, 88 *L.Ed.*2d at 666. *Accord Davidson v. Cannon*, 474 *U.S.* 344, 106 *S.Ct.* 668, 88 *L.Ed.*2d 677 (1986).

officials negligently lost a hobby kit he had ordered by mail. Plaintiff contended that he had been deprived of his property without due process of law in violation of § 1983. The district court's judgment in plaintiff's favor was affirmed by the United States Court of Appeals.

The Supreme Court rejected Nebraska's contention that only an intentional deprivation of property would support a § 1983 claim. The Court focused on whether plaintiff had "suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." *Id.* at 537, 101 *S.Ct.* at 1914, 68 *L.Ed.*2d at 430.

In resolving this issue, the Court noted that deprivation of a property or liberty interest pursuant to an established state procedure usually has required a predeprivation hearing. *See Fuentes v. Shevin*, 407 *U.S.* 67, 92 *S.Ct.* 1983, 32 *L.Ed.*2d 556 (1972); *Bell v. Burson*, 402 *U.S.* 535, 91 *S.Ct.* 1586, 29 *L.Ed.*2d 90 (1971); *Mullane v. Central Hanover Trust Co.*, 339 *U.S.* 306, 70 *S.Ct.* 652, 94 *L.Ed.* 865 (1950). The Court, however, also observed that in some circumstances the availability of a postdeprivation remedy can satisfy the Due Process Clause. *Parratt, supra*, 451 *U.S.* at 538, 101 *S.Ct.* at 1914, 68 *L.Ed.*2d at 430-31. *See Ewing v. Mytinger & Casselberry, Inc.*, 339 *U.S.* 594, 70 *S.Ct.* 870, 94 *L.Ed.* 1088 (1950) (summary seizure and destruction of drugs); *Fahey v. Mallonee*, 332 *U.S.* 245, 67 *S.Ct.* 1552, 91 *L.Ed.* 2030 (1947) (immediate seizure of property in light of substantial question regarding the competence of a bank's officers); *North America Cold Storage Co. v. Chicago*, 211 *U.S.* 306, 29 *S.Ct.* 101, 53 *L.Ed.* 195 (1908) (seizure and destruction of unwholesome food without a prior hearing). The

Court noted that, in these cases, exigency or "the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful" postdeprivation review satisfy the requirement of procedural due process. *Parratt, supra*, 451 *U.S.* at 639, 101 *S.Ct.* at 1916, 68 *L.Ed.*2d at 431.

Presaging its ruling on plaintiff-inmate's claim, and in terms peculiarly applicable to the present case, the Court stated:

> The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible to provide a meaningful hearing before the deprivation. That does not mean, of course, that the State can take property without providing a meaningful postdeprivation hearing. The prior cases which have excused the prior-hearing

> requirement have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities.
>
> [*Id* at 541, 101 *S.Ct.* at 1916, 68 *L.Ed.2d* at 482.]

Applying those principles, the Court concluded that the inmate did not state a valid claim under § 1983 because the deprivation resulted from an unauthorized failure of corrections officials to follow established state procedure, and Nebraska provided a postdeprivation remedy under its tort claims procedure. *Id* at 543, 101 *S.Ct.* at 1917, 68 *L.Ed.*2d at 434.

In *Hudson v. Palmer*, 468 *U.S.* 617, 104 *S.Ct.* 3194, 82 *L.Ed.*2d 393 (1984), the Court reaffirmed Parratt and extended it to an intentional deprivation of property. The Court stated:

> While Parratt is necessarily limited by its facts to negligent deprivations of property, it is evident, as the Court of Appeals recognized, that its reasoning applies as well to intentional deprivations of property. The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of

> affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.
>
> [*Id.* at 533, 104 *S.Ct.* at 3203, 82 *L.Ed.*2d at 407.]

The Court refined the application of *Parratt-Hudson* principles in *Zinermon v. Burch*, 494 *U.S.* 113, 110 *S.Ct.* 975, 108 *L.Ed.*2d 100 (1990). Plaintiff, Burch, had executed required documents admitting him to a Florida hospital for treatment of mental illness. Under Florida statutes, a person may be admitted as a voluntary patient based on his " '[e]xpress and informed consent' " which is defined as " 'consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision.' " *Id.* at 123, 110 *S.Ct.* at 982, 108 *L.Ed.*2d at 112. Burch was admitted as a voluntary patient though his condition and behavior on admission could have supported an inference that he was not competent to make a knowing and willful decision regarding admission. He also executed consents to treatment. Burch remained at the hospital for five months, and during that time no hearing was held regarding his status.

Burch commenced an action under § 1983, alleging a deprivation of liberty without procedural due process, *i.e.*, the procedural safeguards available under Florida law utilized in cases of involuntary commitments. The district court dismissed the complaint for failure to state a claim, and the United States Court of Appeals reversed. The issue was whether the *Parratt*

holding, that the availability of a postdeprivation remedy satisfied due process, applied to Burch's claim.

The Supreme Court rejected Burch's contention that *Parratt* applied only to deprivations of property. The Court ruled that the involvement of a deprivation of liberty "does not automatically preclude application of the Parratt rule." *Id.* at 132, 110 *S.Ct.* at 987, 108 *L.Ed.*2d at 118. The Court narrowed the issue to the following question: "whether predeprivation procedural safeguards could address the risk of deprivations of the kind Burch alleges." *Ibid.*

The Court answered the question in the affirmative. The Court noted that Florida statutes "do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient." *Id* at 135, 110 *S.Ct.* at 988, 108 *L.Ed.*2d at 120. Because it is foreseeable that a person seeking treatment for mental illness might not be competent to consent to admission, the Court criticized the absence of a procedure to determine competency, and observed that, unlike *Parratt* and *Hudson*, there is a predictable point in the admissions procedure when a deprivation of liberty will occur, if at all. *Id.* at 136, 110 *S.Ct.* at 989, 108 *L.Ed.*2d at 121. The Court concluded by stating:

> Unlike Parratt and Hudson, this case does not represent the special instance of the . . . due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged.
>
> [*Id.* at 139, 110 *S.Ct.* at 990, 108 *L.Ed.*2d at 122.]

The Court affirmed the reversal of the order dismissing Burch's complaint.[3]

The Court also found the *Parratt* rule to be inapplicable in *Logan v. Zimmerman Brush Co.*, 455 *U.S.* 422, 102 *S.Ct.* 1148, 71 *L.Ed.*2d 266 (1982). Logan had filed an employment discrimination claim with the Illinois Fair Employment Practice Commission (Commission). Under an Illinois statute, the Commission had 120 days to hold a factfinding conference, but the Commission's staff convened the conference five days beyond the 120 day period. The Illinois Supreme Court determined that the Commission's failure to comply with the statute deprived the Commission of jurisdiction to adjudicate Logan's claim and, therefore, rejected Logan's contention that termination of his claim, because of the Commission's failure to comply with the statute, violated his right to due process.

The United States Supreme Court determined that Logan's cause of action against his former employer was a constitutionally protected interest which could not be extinguished by the state without a hearing on the merits. The Court declared:

> Logan's interests in retaining his employment, in disproving his employer's charges of incompetence or inability, and —

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3. Justice O'Connor dissented joined by the Chief Justice and Justices Scalia and Kennedy. They believed that *Parratt* applied because the gist of Burch's complaint was that a wanton and unauthorized departure from established practice caused the deprivation. The dissent accused the majority of transforming that allegation into a challenge to the adequacy of Florida's admission procedures. *Id.* at 140-41, 110 *S.Ct.* at 991-92, 108 *L.Ed.*2d at 123-24.

> more intangibly — in redressing an instance of alleged discrimination, are all substantial. At the same time, the deprivation here is final; Logan, unlike a claimant whose charge is dismissed on the merits for lack of evidence, cannot obtain judicial review of the Commission action. A system or procedure that deprives persons of their claims in a random manner, . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated. And the State's interest in refusing Logan's procedural request is, on this record, insubstantial.
>
> [*Id.* at 434-35, 102 *S.Ct.* at 1157, 71 *L.Ed.*2d at 277.]

The Court rejected application of the *Parratt* rule, though the employer contended that Logan was the victim of a negligent deprivation and, therefore, a postdeprivation remedy against the state for damages under the appropriate Illinois statute would satisfy due process. The Court distinguished *Parratt* on the ground that Logan's loss resulted from "the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference — whether the Commission's action is taken through negligence, maliciousness, or otherwise." *Id.* at 436, 102 *S.Ct.* at 1158, 71 *L.Ed.* 2d at 278.

In the present case, the threshold issue is whether Baltarzuk's actions as a sitting member of the Board constituted random and unauthorized conduct within the *Parratt-Hudson*

doctrine or whether they fall within the *Zinermon-Logan* orbit. The ordinance creating the Board complicates resolution of the issue. The ordinance establishes a five member Board, "of whom one (1) shall be a mobile homes park landlord and one (1) a tenant of a mobile homes park. The Chairman shall be chosen . . . from among the nonlandlord/nontenant members." It could be argued that Baltarzuk's adversarial posture as a tenant representative is built into the rent adjustment scheme and, therefore, as in *Logan*, plaintiff's deprivation of due process was part of the "state" system. Thus, the deprivation would not be the result of a random and unauthorized act.

We reject the argument. Although the ordinance requires landlord and tenant representation on the Board, we are persuaded that the role of those special interest representatives, as established in the ordinance, does not include adversarial participation at the hearing or the presentation of, or reliance on, evidence gathered by them outside the record. The ordinance specifies that the "Board shall give both the landlord and tenant reasonable opportunity to be heard before making any determination and shall base its determination on the reasonable, credible evidence before it," thereby precluding use of any outside information gathered by any Board member.

The role of the landlord/tenant representatives on the Board is analogous to the role of party-designated arbitrators sitting with a neutral arbitrator. Defining that role in *Barcon Associates v. Tri-County Asphalt Corp.*, 86 *N.J.* 179, 430 *A.*2d 214 (1981), our Supreme Court stated:

> While a party-designated arbitrator may approach the arbitration proceedings with some sympathy for the position of the party

> designating him, such an arbitrator must remain faithful to the obligation which rests upon him to maintain 'broad public confidence in the integrity and fairness of the [arbitration] process.' [Holtzmann, *The First Code of Ethics for Arbitrators in Commercial Disputes*, 33 *The Business Lawyer* 309, 312 (1977)]. Thus, *all* arbitrators should 'conduct the proceedings in an evenhanded manner and treat all parties with equality and fairness at all stages of the proceedings.' *Id.* at 316. Most important, arbitrators 'should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.' *Id.* at 317.
>
> [*Id.* at 190, 430 *A.*2d 214.]

Accord American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 *N.Y.* 398, 405, 148 *N.E.* 562, 564 (1925). These principles are especially applicable when the adjudicating body is a public agency.

We conclude that Baltazuk unilaterally assumed a role not authorized in the ordinance and that his behavior was random, not reasonably to be anticipated, and not pursuant to an established state procedure or custom. *See Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 *F.*2d 977, 983 (9th Cir.1987), *cert. denied*, 488 *U.S.* 827, 109 *S.Ct.* 79, 102 *L.Ed.*2d 55 (1988) (*Parratt* rule applicable to due process violation occasioned by county supervisor voting in matter in which he had a conflict of interest); *Holloway v. Walker*, 784 *F.*2d 1287, 1291-93 (5th Cir.1986) (*Parratt* rule applicable to alleged

conspiracy between trial judge and other litigants to deprive adverse litigants of their rights and property). As in *Parratt*, the state could not have provided a meaningful hearing designed to predict the behavior of one of the Board members. *Logan*, *supra*, and *Zinermon*, *supra*, are, therefore, distinguishable. *Logan* involved the automatic loss of a claim, though the triggering act was a state employee's failure to adhere to the mandated time limits. The loss was the proximate consequence of adherence to a state procedural remedy regardless of the source of the delay. *Zinermon*, unlike the present case, involved a foreseeable deprivation at a point in time, admission to the hospital, where it was practical for the state to provide a mechanism to determine the competency of voluntary admittees. Plaintiffs reliance on *Gregg v. Township Comm. of Tp. of Hazlet*, 232 *N.J.Super.* 34, 666 *A.*2d 348 (App.Div.1989), is misplaced. The only issue this court addressed in Gregg was whether plaintiffs were entitled to counsel fees under § 1988 in light of a "conceded" violation of § 1983. *Id.* at 37, 556 *A.*2d 348.

We also conclude that New Jersey provides a meaningful postdeprivation remedy. In New Jersey, the actions of municipal agencies are subject to review in the Superior Court, Law Division, in an action in lieu of prerogative writs.[4] *See generally Alexander's v. Borough of Paramus*, 125 *N.J.* 100, 107-08, 592 *A.*2d 1168 (1991); *In re LiVolsi*, 85 *N.J.* 576, 592-94, 428 *A.*2d 1268 (1981). The trial court's review of the agency action is based on the record below, and the agency's determination is set aside if it is arbitrary, capricious or unreasonable, not supported

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4. The prerogative writs are *certiorari*, *quo warranto*, *prohibition* and *mandamus*. They were superseded by the New Jersey Constitution in 1947 which provided for "review, hearing and relief" in the Superior Court in lieu of the superseded writs. *N.J. Const.* art. VI, § 5, ¶ 4.

in the evidence, or otherwise contrary to law. *See Reid v. Township of Hazlet*, 198 *N.J.Super.* 229, 486 *A.*2d 940 (App.Div.), *certif. denied*, 101 *N.J.* 262, 501 *A.*2d 931 (1985); *Green Acres of Verona v. Borough of Verona*, 146 *N.J.Super.* 468, 470, 370 *A.*2d 63 (App.Div. 1977); *see also, Harry's Village, Inc. v. Egg Harbor Tp.*, 89 *N.J.* 576, 587-88, 446 *A.*2d 862 (1982).

The review of agency determinations afforded in actions in lieu of prerogative writs is a more effective postdeprivation remedy than the postdeprivation tort claims that were available to the plaintiffs in *Parratt* and *Hudson*. *See Anastasio v. Planning Bd. of Tp. of West Orange*, 209 *N.J.Super.* 499, 522, 507 *A.*2d 1194 (App.Div.); *certif. denied*, 107 *N.J.* 46, 526 *A.*2d 136 (1986). The tort remedy is indirect; it redresses the violation of a plaintiff's rights with a payment of money. The action in lieu of prerogative writs provides a direct remedy; it substantially restores the status quo by overturning the agency ruling that was the fruit of the due process deprivation. *See Holloway v. Walker*, *supra*, 784 *F.*2d at 1292 (right of appeal from determination of allegedly corrupt judge was an adequate postdeprivation remedy); *cf. Lake Nacimiento Ranch*, *supra*, 830 *F.*2d at 983-84 (action for damages under California statute where an official participates in a governmental decision despite his financial interest is an adequate postdeprivation remedy under *Parratt*).

To recapitulate, Baltarzuk's actions were random and unauthorized, and the state provided an adequate postdeprivation remedy. Consequently, plaintiffs received all the process to which they were entitled and, therefore, defendant Board did not deprive plaintiff of due process. *Parratt*, *supra*, 451 *U.S.* at 544, 101 *S.Ct.* at 1917, 68 *L.Ed.*2d at 434; *Hudson*, *supra*, 468 *U.S.* at 536, 104 *S.Ct.* at 3205, 82 *L.Ed.*2d at 409.

Appendix B

On their cross-appeal, plaintiffs contend that the trial court erred in remanding their rent increase application to the Board instead of determining the rent increase issue in the Law Division. This contention is without merit. *R.* 2:11-3(e)(1)(E). Plaintiffs also contend that they are entitled to punitive damages for the § 1983 violation, a greater award of counsel fees, interest and other costs, and counsel fees generated by proceedings in the Appellate Division, including this appeal. In light of our determination that defendant did not violate § 1983, we need not address those issues.

The judgment against defendant for counsel fees and compensatory damages is reversed. The judgment remanding plaintiffs' application to the Board is affirmed.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, THE LAW DIVISION, OCEAN COUNTY FILED APRIL 14, 1993

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Attorney for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — OCEAN COUNTY

DOCKET #: OCN-L-6650-90

CIVIL ACTION

DAVID RIVKIN, EDWARD RIVKIN and JUDITH RIVKIN, t/a GALAXY MANOR, A New Jersey Partnership,

Plaintiffs

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Defendants

FINAL ORDER OF JUDGMENT FOR ATTORNEYS FEES AND COSTS OF SUIT

THIS MATTER having come before the Court sitting without a jury on February 16, 1993, and also on April 5, 1993, and the Court having heard the evidence and the argument of the attorney for their respective parties, the Court finds:

Appendix C

1) That the Dover Township Rent Leveling Board (hereinafter "The Board") violated plaintiffs' due process rights during the course of hearings on a rental increase application which commenced on or about June 19, 1990;

2) That the said violations of due process are prohibited by 42 U.S.C. 1988;

3) That as a result of the violations of 42 U.S.C. 1983, plaintiffs are entitled to an award of counsel fees and costs of suit under Title 42 U.S.C. 1988;

THEREFORE, it being the opinion of the Court that judgement should be entered in favor of the plaintiffs, for the relief demanded in the complaint with respect to counsel fees and cots:

IT IS, therefore on this 14th day of April, 1993

ORDERED, that judgment for counsel fees and costs be entered in favor of the plaintiff and against the defendant in the sum of $39,679.55 together with costs to be taxed, and it is further

ORDERED, that defendant shall pay to plaintiff $6,303.34 as and for compensatory damages.

IT IS further hereby certified that pursuant to Rule 4:42-2, this Order is final and enforceable under Rule 4:59, and for purposes of appeal.

s/ Rosalie B. Cooper, J.S.C.
Hon. Rosalie B. Cooper, J.S.C.

APPENDIX D — TRANSCRIPT OF HEARING DATED FEBRUARY 16, 1993

OCEAN SUPERIOR COURT
CIVIL PART
OCEAN COUNTY, NEW JERSEY
DOCKET NO.: L-6655-90

Place:
Ocean Superior Court
Civil Part Ocean County, New Jersey

Date:
February 16, 1993

TRANSCRIPT OF PROCEEDINGS

GALAXY MANOR

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendant

BEFORE:

HONORABLE ROSALIE B. COOPER, J.S.C.

TRANSCRIPT ORDERED BY:

COURTLAND T. BABCOCK
2610 Yorktown Blvd.
Brick Township, NJ 08723

Appendix D

APPEARANCES:

REUEL TOPAS, Attorney for the Plaintiff

COURTLAND BABCOCK, Attorney for the Defendant

Transcriber Phyllis Binder
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	DIRECT	CROSS	REDIRECT	RECROSS
WITNESS FOR THE PLAINTIFF				
WITNESS FOR THE DEFENDANT				

THE COURT: Decision

[3] THE COURT: I think your counsel fees are a problem, think of the last case. All right.

MR. TOPAS: Is that your secret weapon Judge?

THE COURT: Definitely this is my secret weapon because she has to explain to me why I have these numbers and maybe you can. Your appearances.

* * *

MR. BABCOCK: You've effectively listed from Mr. Topas' letter of January 8 certain items that are to be [29] deducted from the total fifty eight thousand dollars, and that's this thirty nine thousand dollar figure. Now as I understand Your Honor's ruling, is it at this juncture that that is the amount of money that Mr. Rivkin is entitled to be reimbursed?

THE COURT: Yes.

MR. BABCOCK: All right now if I understand that correctly then I have the following comments. First with respect to that which I assume Mr. Topas wants to speak to and I'll certainly speak to it at length, let me just add the following for the record. I do not agree that the giving of counsel fees in this circumstance is appropriate, I think the record should probably reflect for today's purposes that Your Honor has conducted two prior telephone conference calls with counsel about the substance of your rulings today and as I understand those from December 7 and December 23, 1992, certain of The Court's indications given in those telephone conferences which are on the record are a portion of or the foundation for the factual findings that youve made today. And thus I understand where you have gotten to or where The Court has gotten to in terms of the figure that has been recounted. Now having said that I still disagree as a matter of law for a number of reasons, not only because of the non-existence of the respondeat superior theory and in the face of Gregg and Alsar Technology, cases in State Court which in effect say to you as [30] a trial Judge you must grant counsel fees. I accept that as a given, that's the law. What's wrong in this case is that the correct party is not a defendant in the case. Because what is the mistake is presuming that an issue of indemnification, that the township may or may not determine to pay is the equivalent of naming the correct party defendant in the case and pursuing and proving a claim against that party. What I mean by that is not only what the

law indicates as I understand it, but that Your Honor's ruling in November of 1991 did not find any malfeasance, improper conduct, unconstitutional conduct as I understand it by the Dover Township Rent Leveling Board. It found it as to an individual and that individual infected the ultimate decision. Now maybe I'm pursuing an issue that Your Honor feels is already crystal clear in terms of the order entered. If that is the case, I don't know if The Court feels any need to clarify that at this juncture, but I certainly still don't understand that this court found the Rent Leveling Board to have committed unconstitutional acts.

THE COURT: Well I found that because of the actions of Mr. B. in this case that his actions permeated the board, that the board allowed his actions and comments to affect their judgment in the case and therefore the board was recalcitrant with respect to this matter as Mr. B. being the if you will the yeast in the decision making. But they allowed and accepted his comments and incorporated it into their findings, and as I [31] remember it he came off with a number that was no where, that actually had no factual basis, and that was, but what I am saying to you is that I think that in allowing him to continue descent, and I think that Mr. Levin many times pointed out the prejudicial attitude of this gentleman, I think that it permeated the whole decision of the board, not just his act, but the whole decision of the board and in allowing it to happen, and I think he should have been asked by the chairman to step down and I think that, and I thought that I crystally clear found that the board was in violation of his rights, but the active ingredient to make the board recalcitrant with respect to his civil rights was this Mr. B. So I can make it clearer then that.

MR. BABCOCK: I understand that perfectly Your Honor and to the extent that that is or isn't a clarification, I appreciate

* * *

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THE COURT: No I want to hear from you as soon as I can hear from you, but after I hear from you then he will have ten days to supplement what he wants, you will have ten days [50] thereafter to do whatever you want to do, and we'll set it down or an argument, but I have to get a date certain on this so that we end this, and you can go forward to that, whatever you want to do in the future.

MR. BABCOCK: All right and I do need to apply for the stay Your Honor because undoubtedly the Township Committee is going to direct me to appeal it.

THE COURT: Well I have no problem with that —

MR. BABCOCK: No I know you don't Judge —

THE COURT: Just do it.

****

STATE OF NEW JERSEY)
) SS
COUNTY OF MONMOUTH)

I, PHYLLIS BINDER, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of Galaxy Manor versus Dover Township Rent Leveling Board on February 16, 1993, in the Ocean County Superior Court, Civil Part, and recorded on Tape #RBC-68-93, Index #0520-6460, of that court.

Appendix D

Date: June 24, 1993

s/ Phyllis Binder
Phyllis Binder
BESTWAY TYPING UNLIMITED

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY FILED NOVEMBER 15, 1991

BABCOCK, HENNES & BIELORY, P.C.
2610 Yorktowne Boulevard
Bricktown, New Jersey 08723
(908) 255-6500
Attorneys for Dover Township
Rent Leveling Board

SUPERIOR COURT OF NEW JERSEY LAW DIVISION:
OCEAN COUNTY

Docket No. OCN-L-6650-90

Civil Action

DAVID RIVKIN, EDWARD RIVKIN and JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership

Plaintiffs

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendants.

ORDER

THIS MATTER, having been presented to the Court upon a status conference conducted on October 25, 1991, and upon a regularly scheduled trial date on November 1, 1991, and the

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Court having had the benefit of the briefs filed, arguments of counsel and for good cause shown,

IT IS, on this 15th day of Nov. 1991

ORDERED that the original determination of the Dover Township Rent Leveling Board, dated November 20, 1990, is hereby vacated due to the record before the Board evidencing bias and prejudice of a single Board member, Mr. Baltarzuk, which finding mandates a remand to the Board of all of the issues presented on the original application for the conduct of complete and full hearings and findings of fact and conclusions of law to be generated by the Board in the normal course; and it is further

ORDERED that in such remand hearings, Mr. Baltarzuk may not participate as a member of the Dover Township Rent Leveling Board; and it is further

ORDERED that an application for counsel fees has been made by Plaintiff, David Rivkin, which application the Court reserves its decision on based on and to follow the remand hearings required by this Order, and such additional briefs from counsel for the Dover Township Rent Leveling Board and plaintiff as they may wish to file; and it is further

ORDERED AND ADJUDGED that the Complaint and allegations set forth do not raise a question facially as to the constitutionality of the ordinance in issue; and it is further

ORDERED that a copy of the within Order shall be served upon counsel for the defendants within 10 days hereof.

s/ Rosalie B. Cooper, J.S.C.
ROSALIE B. COOPER, J.S.C.

APPENDIX F — TRANSCRIPT OF HEARING AND DECISION DATED NOVEMBER 1, 1991

OCEAN SUPERIOR COURT
CIVIL PART
OCEAN COUNTY, NEW JERSEY
DOCKET NO.: L-6655-90

GALAXY MANOR

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendant

Place:
Ocean Superior Court
Civil Part Ocean County, New Jersey

Date:
November 1, 1991

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE ROSALIE B. COOPER, J.S.C.

TRANSCRIPT ORDERED BY:

COURTLAND T. BABCOCK
2610 Yorktown Blvd.
Brick Township, NJ 08723

Appendix F

APPEARANCES:

REUEL TOPAS, Attorney for the Plaintiff

COURTLAND BABCOCK, Attorney for the Defendant

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DIRECT CROSS REDIRECT RECROSS

WITNESS FOR
THE PLAINTIFF

WITNESS FOR
THE DEFENDANT

THE COURT: Decision

[3] THE COURT: Your appearances please.

MR. BABCOCK: Courtland T. Babcock II of Babcock, Kennis and Bilori for the defendant Dover Township Rent Leveling Board.

MR. TOPAS: Reuel Topas of the law firm of Levin, Shea,

Pheiffer and McMann on behalf of the plaintiff Galaxy Manor Mobile Home Park, David Rivkin, Edward Rivkin and Judith Rivkin.

THE COURT: I just want to put on the record the fact that we had a conference concerning this matter, I think it was last week, last Friday right. The only reason that we are here today is at the insistence of Mr. Topas. I have gotten numerous telephone calls asking for adjournments in this matter. I think it is extremely unfair to try and arrange this court's schedule to suit the people who are part of this case for whatever reason they put forth and I wanted to make it perfectly plain that the only reason we are here is with regard to Mr. Topas's request, and I certainly will allow him to put on the record, but I deeply resent the telephone calls that asked for whatever reasons that this court adjourn this matter when I have put it on specially for a hearing, which Mr. Babcock felt was totally unnecessary and Mr. Topas did not. I would also note for the record a case that was not part of the thirty or forty page brief that was sent to this court and that is Gregg versus Township Committee and I would really like you [4] to address that issue first because that would appear to this court to say that with respect to counsel fees and civil rights that plaintiff or Mr. Rivkin was entitled to counsel fees with respect, and costs, with respect to the prior hearing. The Court having found and will find again there was bias and prejudice on the part of Mr. B. whose name I can never remember, but I'm sure that you will assist me in that.

MR. BABCOCK: Baltarzuk.

THE COURT: Baltarzuk. And having found that there would have been an automatic denial of due process under the circumstances. There is no question facially as to the

constitutionality of the ordinance and this court would certainly not intervene with its opinion as to anything other than that which I stated since I thought it was so prejudicial that I thought that the case had to be remanded, having another person sit. But I think that the question of counsel fees as raised in this Appellate Division case as I note again was not presented to this court previously does raise a good faith question concerning The Court's discretion with respect to the award of counsel fees in a circumstance which is totally different, but nevertheless comes out to a denial of due process because of undue prejudice. I would ask you to address that Mr. Babcock since the case is pretty clear in its language concerning that.

MR. BABCOCK: Well if Your Honor please I would have [5] to preliminarily indicate on the record that my first addressing of Gregg would be to move to suppress it because Your Honor in effect and I don't mean it in the context of The Court permitting it, but Your Honor gave the benefit of both Mr. Topas and myself The Court's thinking and analysis as to all of the facts of this case last Friday. I received a copy of this case, which I am familiar with having dealt with the issue both for this township and others by fax that was on my desk this morning when I returned to my office after having been in trial in Essex County since last Friday when I was last before Your Honor. So my first comment is that to provide Mr. Rivkin in this action a minimum of two bites at the apple is an inappropriate thing to do. I'm familiar for example with this court's ruling on this case and the comment made by Your Honor last Friday, in effect if I may paraphrase, what in God's name is there left to brief in this matter, because as you've already indicated the issues were shall I say copiously addressed.

THE COURT: Although I have to put an addendum to that

* * *

Your Honor to accept the interpretation of my expert. [17] I'm saying that this is a legal question, that The Court does not owe any deference to the board's determination of a question of law and that The Court can look in with or without regard to what our respective experts have said and say what does the ordinance mean and what does the IRS Code, say the ordinance means and make a determination which expert was right or both were wrong.

THE COURT: No I can't make that determination any more than I can make a determination in this case while I'm hearing a jury case and two experts are offered, whether expert for the plaintiff is correct or expert for the defendant is correct. I can not and I should not. That's no my province. We have a rent control board sitting in effect as a jury. They are making findings. You present an expert who says X, there is an expert on the board who says Y. They can accept whatever expert they believe. Obviously they accepted the board's expert, but very differently than the Helmsley case because they did not except his numbers across the board, they made individual fact findings as to each individual item. I think that, however, and I do say this adviseraly, that the board should be advised that if they unrefuted testimony, unrefuted credible testimony, that they can not just off the wall make a decision that it's wrong or right. They have to have something more than that, and I think that there are a couple of cases, there are a couple of matters and that's why I mentioned the [18] fire hydrant part of that case where they decided that the truck had run over the fire hydrant, but then there was unrefuted testimony that repairs had been made, and they just took out the whole fire hydrant on the basis that the truck ran over the fire hydrant. And I think that if they had been advised at that point in time that they can not make an assumption without having some proof to the contrary, that the would be a more valid, that is a valid

decision on their part. You understand what I'm saying.

MR. BABCOCK: Yes and I've written it down.

THE COURT: Okay. Go ahead.

MR. TOPAS: If I might continue Your Honor.

THE COURT: Yes.

MR. TOPAS: Going further to the argument as far as the fact that the board's decision making below involved an interpretation of the statute —

THE COURT: Ordinance.

MR. TOPAS: Of the ordinance, I beg your pardon. In any case there are no other considerations as Your Honor as pointed out the ordinance is relatively bare of any self-contained interpretive language. It says refer to C, the IRS Code. So it certainly doesn't have within it any of the considerations such as direct benefit to the tenants that the board —

THE COURT: It does not, your right it does not state [19] that —

MR. TOPAS: Did incorporate into its fact finding. In fact you can look right into the resolution of the board and I believe at least to one item which was the paving and the office area, they specifically stated that they found that there was no benefit to the tenants and that therefore they were denying the item and there's no basis —

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THE COURT: What do you think the basis for rent control is? The very basis. You're taking little pieces of this ordinance, the basis for rent control is that the owner should get a fair return on his dollar. That's what the basis of rent control is, and if there are capital expenditures that are made that in some way enhance the value of the property, that he should be recompensed for that. If he bought a helicopter to deliver his from Rumson to the office, that would be a capital expenditure because it certainly would last more than a year and he would pay for it over more than a year. Inherent in a rent control statute this court is finding is the fact that if you are going to have a capital improvement and address it as such that's what your whole argument was, not your argument. Mr. Levin's argument was the driveway benefitted the tenants because it enhanced the look of the whole place and in addition, and they threw it on the side, it also stopped the stones from going down the drain. Okay. That was one thing. That they got a benefit from the computer and [20] from the photocopier that was in the sales office, although they were not permitted to go into the sales office, because it made the work cheaper on the part of the landlord. That they, I'm not talking about the mandatory things, the mandatory things I think they gave him. Mr. Rivkin testified that he allotted fifty percent to the Bobcat, fifty percent to the Tractor, fifty percent to the Back Hoe, fifty percent to the sweeper, this is all from memory as I remember the transcript. And he did that, he was unrefuted, that's one of the things that I was talking about, he was unrefuted in that, and he had been qualified as an expert, and I, that's where that prejudice and bias came in. I think that the gentleman Balterzak, I think that he exercised so much of a negative influence over these people that they lost sight of what that which they should have been looking at. And that's why I told Mr. Babcock that he has to tell these people that they can't lose sight of that. If you've got unrefuted testimony, you've got unrefuted testimony. And it was

unrefuted at that point. And I think that it just, it's just what it was. And I think that when they decide it's going to be over, though I don't understand how and I will tell you and I will put this frankly on the record, how they decide the depreciation time. I have no idea. Nobody really explained that. Somebody said fifteen years, somebody said seven years, I don't know how they do that. I mean, and there was certainly no testimony in those transcripts [21] because I read four transcripts over a long period of time. I have no idea of how that even came about from anybody. So I can't make any, certainly any judgment on depreciation factors, because there was nothing to even consider in that regard. But go ahead.

MR. TOPAS: Your Honor I believe you raised a question about, I was arguing about the point about benefit to the tenants not having been a valid consideration within the ordinance. I understand Your Honor is raising the question that in the general context of rental control there has to be some rational relationship of an item that we're claiming is a capital improvement to the operation of the park, that in some way its to the benefit of tenants. Now it's been our position all along that without a finding of direct benefit to the tenants that when you buy a piece of equipment and you use it in the operation of the park, and that equipment falls within the definition of capital improvement as set forth in the ordinance and defined in the code —

THE COURT: Capital expenditure.

MR. TOPAS: Well it's capital improvement in the ordinance Your Honor, capital expenditure in the code.

THE COURT: Yes sorry.

MR. TOPAS: That in that case that you have a clear cut case, it's not a helicopter coming in from Rumson, the Rivkin shuttle if you will, it is an item that is used within [22] the park and in normally daily operations. Like when you have a factory and you have an office upstairs and they have typewriters and copiers and computers, and likewise they buy street sweeping equipment because they have a large parking lot they have to maintain and keep clean and so forth. And that's seems as clear as day to have been well within the contemplation of the ordinance, and in fact well within what Your Honor is saying. If this is within the park —

THE COURT: Well if that's correct.

MR. TOPAS: This is a piece of equipment that is used in the operation of the park, then it is in fact a capital improvement.

THE COURT: Well no, not necessarily. If they are redoing the driveway because the township, because they keep the papers in a dumpster and the township requires them to redo the driveway and what they've got is insufficient and they won't allow anybody, they won't even allow the tenants according to unrefuted testimony of the tenants to go to that office to pay rent, they will not allow those tenants to use that dumpster for any purpose, where is that a benefit, there's a sales office in there, we all know that, and what I'm saying to you is that inherent in a rent control statute and a capital improvement return, it has to be of some benefit to the park. The case that you cite that came after this case, which I think is irrelevant since the facts are totally different, that was [23] all improvements to the clubhouse, that all of the tenants shared. It was blinds, I forget what else, umbrellas, whatever it was, it was in the clubhouse. I wouldn't have any problem in that situation in deciding that those are all

capital improvements for the benefit of the tenants. But that is a totally different fact scenario. These people are claiming that part of this equipment, they're saying all of the equipment, but at least part of this equipment was used not only for the upkeep of this mobile home park, but it was used to build new trailers, it was used in another trailer park that Mr. Rivkin owned, and god bless him that's fine. But they're saying that they should not be hit with the total cost of this and when they knocked the whole thing out I think they were being unduly influenced by Mr. Balsak, wrong name, but we all know who I mean.

MR. TOPAS: Your Honor touched upon the Homestead Run application which was heard later that night, so I just wanted to —

THE COURT: Which is really irrelevant.

MR. TOPAS: I just wanted to comment that its not the case that in that application all of the items were installed in the clubhouse for the direct benefit of the tenants —

THE COURT: Most of them were.

MR. TOPAS: In fact a truck and some plowing equipment which were very similar to some of the maintenance equipment [24] that we were seeking a rental increase for were granted to Homestead Run and denied to Galaxy Manor.

THE COURT: Yes, but you have a different situation. They weren't building and putting up new trailer park homes with them. Your Mr. Rivkin admitted this.

MR. TOPAS: Right and he only sought an increase for the proportion that it was used —

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THE COURT: That's why I think you have to have a remand. This Court can not sit here and make those decisions. That's exactly what I'm telling you. I am telling you that this man was prejudice, his prejudice showed, the killing stone as far as this court was concerned, was when he advised one of the tenants to file an action, while this action was pending, against the landlord. That was absolutely the straw that broke the camels back as far as this court is concerned. And I think that if you look at all of the language and all of the discussions that he exercised an undue influence over the other board members. That's just as plain as I can say it. But I think that there has to be inherently in a rent control statute, when somebody is looking for a return on a capital investment, there has to be some benefit, and I'm not deciding at this point that they were wrong or right or arbitrary or capricious, I don't have to do that because I'm deciding at this point that it was, what they did was illegal because of the prejudice of this one man which was obviously on the [25] record. And I'm reserving on the counsel fees and I don't what else we have left in this case.

MR. TOPAS: I think that the only thing we do have left is specifically rulings as far as whether there were constitutional violations, and I think Your Honor has already indicated that in a case of bias, in open bias by a board member, which has unduly influenced the other members of the board in their decision making capacity, there is —

THE COURT: Certainly a constitutional issue —

MR. TOPAS: A constitutional issue there and I don't understand —

THE COURT: And I'm going to, but I'm going to allow

* * *

Appendix F

[30] STATE OF NEW JERSEY)

)SS

COUNTY OF MONMOUTH)

I, PHYLLIS BINDER, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of Galaxy Manor versus Dover Township Rent Leveling Board on November 1, 1991, in the Ocean County Superior Court, Civil Part, and recorded on Tape #RBC-165-91, Index #1618-4799, of that court.

Date: June 24, 1993

s/ Phyllis Binder
Phyllis Binder
BESTWAY TYPING UNLIMITED

APPENDIX G — TRANSCRIPT OF HEARING AND FINDINGS BY THE HONORABLE ROSALIE B. COOPER, J.S.C., DATED OCTOBER 25, 1991

OCEAN SUPERIOR COURT
CIVIL PART
OCEAN COUNTY, NEW JERSEY
DOCKET NO.: L-6655-90

GALAXY MANOR

vs.

DOVER TOWNSHIP RENT LEVELING BOARD

Defendant

TRANSCRIPT OF PROCEEDINGS

Place: Ocean Superior Court
Civil Part
Ocean County, New Jersey

Date:
October 25, 1991

BEFORE:

HONORABLE ROSALIE B. COOPER, J.S.C.

TRANSCRIPT ORDERED BY:

COURTLAND T. BABCOCK
2610 Yorktown Blvd.
Brick Township, NJ 08723

Appendix G

APPEARANCES:

REUEL TOPAS, Attorney for the Plaintiff

COURTLAND BABCOCK, Attorney for the Defendant

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DIRECT CROSS REDIRECT RECROSS

WITNESS FOR
THE PLAINTIFF

WITNESS FOR
THE DEFENDANT

EXHIBITS: Ident. Evid.

THE COURT: Decision

[3] NOTE: Judge Cooper via speaker phone from Jefferson Hospital.

THE COURT: Okay just put your names on the record and for whom you are appearing please.

Appendix G

MR. TOPAS: Reuel Topas on behalf of Levin, Shea, Phieffer and McMann, appearing on behalf of the plaintiff of the plaintiff Galaxy Manor Mobile Home Park.

MR. BABCOCK: Courtland T. Babcock of (indiscernible) Babcock, Kennis and Bilori for the Dover Rent Leveling Board.

THE COURT: All right I have read all of your briefs, I have read all the cases that went with all of your briefs, and I've been thinking a lot about this case and I found out through, you know, just in general that there are alternates are there not to this rent control board? They're not just the, Mr. Rivkin was one of them I assume because he was stepping down, but then there were how many people left? Was McKenna the Chairlady, Mr. B., I never remember his last name —

MR. TOPAS: Baltarzuk Judge.

THE COURT: Yes and then who is the last one?

MR. TOPAS: Sophie Chalmer Your Honor?

THE COURT: No that was the Chairlady.

MR. TOPAS: Right.

THE COURT: You also had, you should know these names better than I should.

MR. TOPAS: No not me Judge, I didn't handle the hearings. That's Peter Hennis who was at the hearings so —

Appendix G

[4] THE COURT: There was somebody who was representing, I think Pastel.

MR. TOPAS: That's right Your Honor.

THE COURT: All right now I have read very carefully all of the references in the transcript and I had the transcript at home and I asked my clerk to underline all of the references of this Mr. B, as I call him. And I am finding that Mr. B. has exhibited a great deal of bias and prejudice in this case, and I don't see how, he is permitted under the cases to testify as to things that he knows about in the area such as the price of this, I think he spoke about the price of certain well trappings and so on and so forth, which Mr. Rivkin paid less for then he indicated as I remember the transcript. The thing that bothered me the most about him was that during the course of these hearings he encouraged a tenant to appeal a rent level for which he was successful, but when you go from, I understand that Dover Township takes one person who proportedly is a landlord and one person who is proportedly a tenant and then fills in the other three with public members —

MR. TOPAS: Correct.

THE COURT: And I think the point was made that that, and I think well taken, that that in itself creates an inherent conflict, but what somebody puts on the record when they're supposed sitting as a Board member that I'm here for the tenants that's improper. They can be a tenant's advocate, but [5] not when he's sitting as a Board member. When you're sitting as a Board Member, you're sitting as a Judge and you have to, even though your a tenant's representative and want to do the best for them, that's not your capacity in sitting on a board like that. And my thinking on the whole matter is, and I have notes on the whole

case that already precausily typed up, but must tell you that my initial reaction is that this should be reversed and remanded and omitting Mr. B. as a sitting board member because I think he's improperly there and I think he's exhibited enough bias and Paul if you will read into the record the statements that he made which I asked you to underline in yellow, I'd like to see that on the record as examples for my thinking in this matter.

MR. JOHNSON: Okay Your Honor.

THE COURT: Would you do that please.

MR. JOHNSON: Yes. Okay Mr. Baltarzuk said that his function at the time of the hearing was that he was here to serve the people of the mobile home parks. Mr. Blatarzuk took the position that he wanted the case thrown out because of a mistake in a rent level for one tenant, even though counsel for the Board told him it was not grounds to throw out the application. He later threatened the applicant by stating, you are looking for trouble and you are going to get it. Mr. Baltarzuk advised the tenant witness to file a complaint against the applicant with HUD for an alleged violation of [6] equal housing opportunity.

THE COURT: Okay that is going beyond the boundaries as far as I'm concerned. I can understand some of the other language with respect to the Chairlady. I think that what she did was fair comment, coming to opinions and so on and so forth. But when he comes up saying things like that, I think that his prejudice and bias is obvious, and I think that looking at colloquies between all of the members where they would finally come to an agreement on certain matters, I think that he was greatly influential in their coming to agreements on certain matters. Now I'm not saying that another board would not have

come up with the same decision making, so I am not saying what they did was improper. I am saying that to allow somebody like that to sit on a board with statements such as those that were quoted is improper, and as officers and alternates in this situation I think that the alternate should sit on the board. And I don't know if that alternate and perhaps you can advise me Mr. Babcock whether that alternate would be a tenant's representative, do you know?

MR. BABCOCK: No ma'am I do not.

THE COURT: Okay.

MR. BABCOCK: But I can certainly ascertain that and let you know better mechanically anything occurs.

THE COURT: Well regardless of whether or not, this man as far as I'm concerned has exhibited so much prejudice and [7] bias in this case that it would be improper for him to sit as a hearing officer.

MR. BABCOCK: May I ask you some questions there Judge?

THE COURT: Yes.

MR. BABCOCK: Clearly I hear that you're saying that with respect to the remand that you're indicating you feel so far, on the record so far is the proper thing to do —

THE COURT: Right.

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MR. BABCOCK: What I'm unclear on and I apologize because I'm in trial in Essex and have been for two weeks, I have not been through these pleadings in detail before today. I didn't expect this to be in effect a decision or The Court's advice about where we were.

THE COURT: Well this really is an advisory situation more then anything else.

MR. BABCOCK: I understand that Your Honor. What I'm curious as to is whether what you're indicating to me is that the handwriting on the wall that we should be talking to the Township Committee about him being removed or whether you're indicating to me that that relief isn't in this action and you're not getting to that point, you're simply suggesting to me how this is got to be handled on the remand and then let me worry about the political problem with my client.

THE COURT: Right. What I am saying to you is with [8] the statements that he made in this particular case, I'm not looking at other cases because I don't have to look at other cases, but with statements such as Paul just read into the record for this particular case Mr. B. is showing prejudice, partiality and bias, and in his discussions with the rest of the board members he is exerting a great deal of influence. And I'm not saying he should be thrown off the board, as a matter of fact Mr. Levin a couple of times suggested that he, excuse me, not sit as a board member for this particular case as I remember because I read the transcript a couple of times. But what I'm saying is that that was an error and that although I know the plaintiff is going to say don't remand, make a decision I can't do that because the decision as to what is a capital improvement I cannot accept blindly the statement of Mr. Moll. That's going to be up to whether the board members

accept that statement and in fact it is a very different case then I think the Helmsley case wherein the board depended totally upon the figures that were presented by the accountant.

MR. TOPAS: Your Honor —

THE COURT: In this case, just a second, in this case both gave definitions of what was a capital improvement vis a vis capital expenditure, and there's a world difference between that and what happened in the Helmsley case. And if the Board chooses to accept the definition of its accountant as opposed to the definition of plaintiff's accountant, well that's the [9] way it works in a courtroom.

MR. TOPAS: Your Honor.

THE COURT: Yes.

MR. TOPAS: If I might address just a couple of things that you're talking about dovetailing into the question of, your inclination to go with a remand at this point. First just to back track I would just point out that, why Your Honor is correct that the Board can choose to accept the definition of the accountant. Our whole point in this case is that the accountant was dead wrong, he's is dead, solid wrong —

THE COURT: I know you say that.

MR. TOPAS: We're asking The Court to find that he was absolutely incorrect about —

THE COURT: I can not do that because I don't agree that capital improvements and capital expenditures is the same thing.

MR. TOPAS: I'm sorry Your Honor said you don't agree?

THE COURT: I do not agree with Mr. Moll's definition. The whole point of the rent control act was to allow this man to get a fair return on his dollar spent. And just because he decides to have an expenditure for a period of more than a year, that doesn't automatically make it a capital improvement. It still has to be a capital improvement. That's why you went, as a matter of fact if you looked at Mr. Levin's language, even though it starts off with that definition, in the long run he [10] comes down to and I remember it specifically in the transcripts, that it has to show some not new to the whole park and that's why they went through this whole diatribe with respect to the blacktopping —

MR. TOPAS: I'm sorry I didn't hear the last word.

THE COURT: The blacktopping, the reason for the blacktopping, and then it was thrown in, well that it's also good because it doesn't clog the storm drain. But implicitly there's an admission that, you just can't make a decision that you're going to take yourself over a year and they say well it then becomes a capital improvement.

MR. TOPAS: Well Your Honor I think the definition that we look to is not that the payments extended over a year, but that the useful life of the item is more than one year and that's what the IRS code calls for and that's what the rent leveling ordinance talks about. The only thing it give you is reference to the IRS code.

THE COURT: I know that but you can not take that and just present that. You can't put it, it's not (indiscernible) it doesn't stand by itself. By itself it says other things, and your man is

saying well I gave a fifty percent credit on this spot tax. Well where did he come up with that figure?

MR. TOPAS: Based on a good faith estimate of how much he had used it in one location as to the other.

THE COURT: Well that's not real proof.

MR. TOPAS: It's testimony before the Board Your Honor. It's uncontradicted.

THE COURT: I know, but that's not really proof is what I'm trying to tell you.

MR. TOPAS: I don't think Your Honor intended for us to go to the merits and discuss —

THE COURT: No I am really going to the remand, I have to tell you that. I'm going to, my inclination and if you want me to put it on the record I will be happy to do that, is that I think that this should be remanded because of the bias of one of the board members and, which was plainly shown that this Mr. B., I don't know what his full name is, as exemplified by —

MR. TOPAS: The comments your clerk has placed on the record Your Honor.

THE COURT: Yes, well he, well yes he has put some in, but there is much more than that in the record.

MR. TOPAS: We agree.

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THE COURT: And I think that his prejudice is obvious and I don't think that you can have such obvious prejudice and have a decider effect at the same time.

MR. TOPAS: Your Honor if I might I just wanted to complete my comments about —

THE COURT: Go ahead.

MR. TOPAS: For the record about your decision of your inclination to remand this matter, and that is that obviously [12] as Your Honor anticipated our client would vigorously oppose that kind of a decision on your part. For the simple reason that we've had, the kind of experience we've had with this board. And there's no reason to believe that just because we eliminate Mr. Baltarzuk that we won't end up in the same situation. That's why we got here in the first place.

THE COURT: Well Mr. Baltarzuk is the man that I am finding exhibited the prejudice. The other people when they were discussing things, were discussing things, and that's what they're supposed to do as board members, and I am finding that they are not exhibiting the prejudice that you're talking about. Now when it comes to Mr. Baltarzuk, and it would have been the easiest thing in the world for me to say no he was not prejudice and he could ask these questions, but I really thought about it and I really feel that he overstepped the bounds in this particular case and that's why I asked whether they didn't have an alternate member. In other words I'm finding that when your Board Chairman did not have him step down, that she made a mistake.

MR. TOPAS: I understand.

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THE COURT: And that's the reason. I don't have to decide anything else at this point.

MR. TOPAS: Well Your Honor may I address that particular point. It seems that if you're finding bias, that falls squarely within the violations of due process that we [13] outline in our brief and I don't see how Your Honor can not make a determination on that constitutional issue as well as our attorney's fees.

THE COURT: Well I tell you right now I think you are way off base in forty three, I think that was intended for cases such as police officers, where they kick people in heads. It was not intended, can you imagine viably that every time somebody got an incorrect decision on a Board of Adjustment or a Planning Board that they could come in and cry under the civil rights act that they're entitled to counsel fees?

MR. TOPAS: Your Honor I'm not asking The Court to do that, what I'm suggesting to The Court is that this is not that sort of a case. We just didn't get an incorrect decision, we got a decision which Your Honor has just determined was found to be based on the biased, open biased acts of a board member. That's more than just being incorrect, that's unfair, it's prejudicial, it's —

THE COURT: But I am saying that it does not apply in the situation. You show me one case in which they, except in the most extraordinary of circumstances, do you realize what you are opening the door to when you're asking for this? You go to the Planning Board, the Planning Board gives you an incorrect, not incorrect, but a decision that turns out to be, it's overruled on the trial level, on the constitutional level, on these you're entitled to

counsel fees for that, never. It [14] was never intended like that. That's not what it was intended for.

MR. TOPAS: Your Honor I don't think that there's any basis to find that just because there's no precedent for an award of counsel fees when you're on an appeal of a decision of a municipal body that that by itself precludes the award of those fees. And I think that the issue really is here, is not simply that they were incorrect, they treated our client differently form another applicant who they decided differently on the same issues a half hour later.

THE COURT: That's a bunch of hog wash because that came afterward. Anything that came afterwards The Court can't consider, you know that. What I am saying to you is that I don't think that the civil rights act, first of all he was treated as a landlord, so if you had gone through all of the cases as to the differential treatment, you would see that if he was treated as a landlord and he was certainly treated as a landlord in this case, the big question that comes up was should he have gotten credit for this, for these what he says were capital improvements, which your accountant says were capital expenditures and equating them. And I think that you have to look at the larger part of the rent control act, and although the definition is not there, the definition goes to capital expenditures, not to capital improvements, and they are saying for the purposes of the IRS, yes use capital [15] improvements, use capital expenditures, but they don't say anything about capitol improvements and you know that. It's not in there. I read that statute three times.

MR. TOPAS: What else could they be referring to Your Honor?

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THE COURT: I don't know, but it's not referring to capital improvements, and you have to look at this in the whole context. You just can't draw out pieces. And what I'm saying to you is that on the basis of what I see now, and I will keep your briefs, I will keep all of my notes, but on the basis of what I see here, I think that there was bias and prejudice on the part of one of the members, I think that it was a mistake made by the Chairlady in not removing him, but you have to remember also that she is a lay person and doesn't understand all the nuances in the law, that's why you're on appeal to begin with. I don't think that they have to accept your experts statements that, as to the fact that these were capital improvements, even though you might think it was a perfectly fine statement, and it might be a perfectly fine statement. I don't think they're bound by any experts, they're bound by their own. That's what the cases say. But now I don't think this man got a fair shake because of this one member and as I say Paul, if you want to read more of his statements into the record, then let's do it so that Mr. Babcock has something to take back to the Township Committee.

[16] MR. BABCOCK: Your Honor you don't need to do that for me for the purposes of the Township committee. I'll just indicate for the record that I'm not surprised by the finding you made.

THE COURT: Well I'm sure that Mr. Topas is not either on that aspect, but when you try and jump from there to civil rights and so on and so forth, that's no in my estimation, first of all it's a discretionary call on counsel fees. That's number one, and number two is that I don't think its proper for in this kind of a context for the reasons that I've already put on the record that they should be awarded counsel fees in a situation such as this.

MR. TOPAS: Your Honor I don't want to belabor the point, but if you could clarify for me how you can distinguish between a finding that a board member was biased when acting on behalf of a municipal body and a finding that there's no constitutional violation. It's the very definition of a constitutional violation. To find that there was bias means by itself, its self-defining as a constitutional violation.

THE COURT: The cases, if you read all of the cases, and there's a book right in my chambers, you won't find any case that deals with a board such as this, and getting counsel fees. Not one. They were meant for people who were being beaten up by police officers and so on and so forth and didn't have money to pursue an action. Now you're not going to tell [17] me that your client did not have enough money to pursue the action.

MR. TOPAS: Your Honor that's not the issue, the issue is not whether a person can afford counsel fees, the issue is if they got a raw deal from a public body or somebody acting under color of State Law.

THE COURT: That's not true, that's just not true. A public body such as a Board of Adjustment or Rent Control Board or a Planning Board is entirely different then having the police come down and beat them up. That's what those cases were all about. And it's as I say a discretionary call with The Court and I'm exercising my discretion and I'm not going to allow counsel fees. I'm going to remand this case for a rehearing and I am going to preclude Mr. B. from sitting as a Board Member, and if he wants to testify as a witness, he is permitted to do so, but within the confines of a witness testifying, not as to hearsay and so on and so forth.

MR. BABCOCK: Your Honor given the way in which we've progressed today, I don't know if you want the filing, but I will indicate to you that on behalf of my client I would consent at this juncture to the entry of an order with respect to the balance of the case. I don't know how you intend this to be addressed, whether you're giving us an indication and you want us to go talk about settling, I'm unclear —

THE COURT: A settlement is always the best way to [18] handle a case, if you can do it that way. I'm claiming that this man was put upon by this one board member.

MR. BABCOCK: Then I have no objection to that being the finding and there being an order entered to that effect given the other factual findings that you've entered on the record.

THE COURT: All right now I'm also telling you that if there's a way of settling this case, I can't see where there would be any problem with that either.

MR. BABCOCK: Very well.

MR. TOPAS: Your Honor —

THE COURT: Yes.

MR. TOPAS: I can't set forth the same stipulation as Mr. Babcock —

THE COURT: I'm not asking you to.

MR. TOPAS: I understand that, I just want to also state for

the record that at this point we would have a preference for being able to come in and go through a full argument. We were really not prepared toady, I understood this to be a conference, more on an informal basis, and we were not prepared for the outcome today and I would like to have an opportunity to spread forth all of the issues and points that my client is raising on this prerogative writ.

THE COURT: Are you kidding, you couldn't have possibly anything more. I read that brief, it covered [19] everything from one to ten. I mean and then you asked to put in a responding brief. I couldn't believe that. What more is there left to spread on the record, except the fact that it was read. But if you want this to be on the record, I will be happy to do that. The only problem that you have is Mr. Babcock is on trial for I would dare say a period of time and I have to come back from the hospital. I mean I'm not even out yet and I have to come back in a month.

MR. TOPAS: I understand Your Honor, but I'm merely saying at this point in time I'd like to be able to reserve on making a commitment one way or the other and have an opportunity to go back and discuss it with my client.

THE COURT: Well you certainly can do that, and just let them know in my office because I am in contact with them daily.

MR. BABCOCK: Very good Judge and we can also —

THE COURT: And then talk to the Township Committee Mr. Babcock.

MR. BABCOCK: I will Your Honor.

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THE COURT: About trying to settle this matter because I think that there are things that to me appeared and I'm not offering my judgment in place of the Board's judgment, I would never think of doing that, but I think there are things in there that because of Mr. B's prejudice were really not properly considered. And I'm not talking about anything [20] specific, oh yes, let me just give you one example. There was evidence that somebody saw one of his trucks (indiscernible) fire hydrant. But he testified under oath without any opposition that whatever harm that was done at that time was fixed. And then they go and take off half of the amount of the fire hydrant. Now we're very loose on rules of evidence and so on and so forth, but not that loose. I mean I can remember that specifically because that was uncontradicted evidence. That even if he broke it, he fixed it. And then he had to come in and he had to replace it. And when the Board took off that however many dollars I think it was four hundred and fifty dollars or some amount like that, there was just no basis for that. So I think that you should go really through these things one by one and come to some kind of accommodation.

MR. BABOCK: I will recommend that Your Honor.

THE COURT: Right and I am asking Mr. Topas to discuss that with his client as well. All right.

MR. BABCOCK: Very good Judge.

MR. TOPAS: Thank you Your Honor

****

Appendix G

[21] STATE OF NEW JERSEY)
) ss
COUNTY OF MONMOUTH)

I, PHYLLIS BINDER, assigned transcriber, do affirm that the foregoing is a true and accurate transcript of the proceedings in the matter of Galaxy Manor versus Dover Township Rent Leveling Board on October 25, 1991, in the Ocean County Superior Court, Civil Part, and recorded on Tape #RBC-159-91, Index #0008-1724, of that court.

Date: June 24, 1993

s/ Phyllis Binder
Phyllis Binder
BESTWAY TYPING UNLIMITED

(2)

JUL 11 1996
CLERK

No. 95-1980

In The

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership,

Petitioners,

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Although mentioned by Petitioner in oblique fashion, Petitioner does not advise this Court that following the remand hearings required by the Superior Court of New Jersey, Law Division judgment, substantial additional hearings were held before the Dover Township Rent Leveling Board. The result of those hearings was the granting of additional capital improvement increases which are mentioned in Petitioner's Brief (PB3;2).

Following the result of those remand hearings, the same Mobile Home Park commenced a Prerogative Writ action to seek a reversal of the results of those remand hearings. In that action, both the Board and Mr. Baltarzuk, individually, were sued. That case was tried to the court sitting without a jury and a judgment rendered in favor of the Rent Leveling Board. (RA 1a-3a). The conduct of the Board was found to be appropriate and not arbitrary, capricious or unreasonable, and the Prerogative Writ Complaint was dismissed. Subsequently, the remaining claims in the case were dismissed by Stipulation of Dismissal (RA 4a-5a). Galaxy Manor Mobile Home Park has, therefore, received all of the capital improvement increases it was ever entitled to. No appeal was ever taken from the second Prerogative Writ trial judgment, nor from the dismissal of suit number two. The judgment of the trial court and Stipulation of Dismissal are a portion of Respondent's Appendix to this Court.

We also note that Petitioner has not provided this Court with three letters of the trial court which constitute a portion of its Opinion. We concede that that omission has no bearing on the Petition, since the letters of the court speak to counsel fee issues which were never reached by virtue of the state court's final decision.

The Municipal Ordinance has been included in Respondent's Appendix as well (RA 6a-42a).

I.

THERE HAS BEEN NO DENIAL OF PETITIONERS' EQUAL PROTECTION RIGHTS.

Petitioners' brief leaps a chasm concluding without a factual foundation that the conduct that they contend equates to a violation of substantive due process rights should somehow equal "purposeful discrimination" and, therefore, also equate to an equal protection violation. Other than to describe cases that conclude that equal protection may apply in the land use context, there is no analysis nor argument presented as to how these principles apply in this particular case.

It is abundantly clear that in assessing equal protection arguments, legislative enactments reasonably related to legitimate state interests which are, therefore, in furtherance of appropriate legislative goals are not violative of due process or equal protection. *Pennell v. City of San Jose*, 485 U.S. 1, 11-15, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988). Thus, it seems clear that the equal protection argument being made cannot be infered to rise from the Dover Township Ordinance in question. Further, "the Fourteenth Amendment gives the Federal Courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 485-86, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

In effect, something more than simply labeling facts as a denial of equal protection must be shown. In this case, there is no animus or racial motivation alleged nor proven. It appears as the New Jersey Supreme Court perceived Petitioners' equal protection argument, that Petitioners' have simply endeavored

to relabel a due process argument (whether it be viewed to be substantive or procedural) as an equal protection argument (PA31A-33A). The real argument being made by these Petitioners, although there has been an effort to shift the labels as the argument has failed, is that the process they were subject to was deficient because of Mr. Baltarzuk's behavior. That position was seen by the Superior Court, Appellate Division (PA40) as a procedural due process violation, and it was found by the Appellate Division that no procedural due process violation had occurred because Mr. Baltarzuk's behavior was random, in accordance with the doctrine of *Paratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), and there was an adequate post deprivation remedy.

The New Jersey Supreme Court, for purposes of reaching both the procedural and substantive due process arguments, assumed, *arguendo*, a substantive due process violation for the purpose of being able to address it. The New Jersey Supreme Court found that "the conduct of an errant board member who berated an applicant and brought in facts outside the record at a rent proceeding in violation of acceptable board practice does not rise to the level of a substantive due process violation under the Supreme Court standards." (A14A) "Even though the Rent Leveling Board may have violated its own standards of governance by allowing a member with a demonstrated bias to participate in the hearing, we believe that such governmental action does not give rise to a substantive due process claim." (A17A).

The factual circumstances as found by both the Appellate Division and the New Jersey Supreme Court were the same as the trial court but viewed differently. That, although crude and/or out of line with appropriate board member behavior, the conduct was rational since it was based upon Mr. Baltarzuk's repeatedly stated ability to deal with the application on the merits and not be

prejudiced. Further that position was, in part, premised upon the Ordinance (PA48) (RA38a) and the fact of Mr. Baltarzuk's belief that his position on the Board was that of a tenant member. (PA48; A4; A19).

This understanding, albeit possibly a nuance, has escaped Petitioners, potentially because they have been too close to another view of what was occurring, both in the original hearings before the Board and subsequently in all of the litigation. However, proof of the pudding comes to pass in assessing the equal protection argument that is raised because certainly if the behavior of the board member were "truly irrational" such as to reach any judgmental level of shocking or offensive behavior, the equal protection argument put forth would have some bite and substance. It has none because whether you are trying to relabel a procedural due process argument as equal protection or simply call it equal protection from the outset, the majesty of the argument stands out from the content of the facts, and that does not occur in this case.

What has really been argued is that there has been a due process violation. We believe that the due process violation is a procedural due process violation to which *Paratt, supra*, more than adequately speaks. The New Jersey Supreme Court appears to agree (A20A-21A).

II.

THERE IS NO COMPELLING REASON TO GRANT THIS WRIT, THE NEW JERSEY SUPREME COURT HAS DECIDED WHAT THE STATE'S SUBSTANTIVE LAW IS AND THIS COURT SHOULD HONOR THAT DETERMINATION AND DENY GRANTING THE PETITION.

Petitioners' brief contains commentators' suggestions that the United States Supreme Court might further define substantive due process (PA11-12). It is also argued that as a matter of federal law a number of circuit courts of appeal may or may not decide this case differently than the Appellate Division and New Jersey Supreme Court decided it (PB12-13). Thus, the argument goes, *a fortiorari*, this Court must decide this case as a method of rectifying the differences between decisions in the circuits and/or New Jersey Supreme Court. But why, factually, legally, is it only because the state courts decided the facts contrary to Petitioners. The entreaty is inappropriate.

In accordance with the Constitution of the United States, the Tenth Amendment requires that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution and concepts of federalism require that for this Court to exercise jurisdiction, something more than entreaties and/or commentary are required.

It is simply clear that property law concepts are concepts which are to be set by state law. *Budinick v. Becton Dickinson and Company*, 486 U.S. 196, 198, 108 S. Ct. 1717, 1720, 100 L. Ed. 2d 178 (1988). Even in the context of regulatory takings and/or deprivations of property rights found to equate to a constitutional level, this Court honors principles of federalism

in determining that questions of state law shall be dealt with by state courts and not by the United States Supreme Court. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

What are the facts and/or the legal proposition that cry out for this Court's attention? None are really postulated.

Is it that in addition to an effort to label a procedural due process claim, a substantive due process claim, and then as an equal protection claim, that another relabeling is sought? Is this an effort by this party to relabel claims barred by *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) and *Lucas, supra*, as something else in the hopes of some other reexamination? No basis is set forth for this Court to exercise jurisdiction because there is none, only a hope that will happen.

III.

AT MOST, PROCEDURAL DUE PROCESS VIOLATIONS OCCURRED IN THE MUNICIPAL RENT LEVELING BOARD HEARINGS. THOSE "VIOLATIONS" RESULTED FROM RANDOM CONDUCT OF A BOARD MEMBER FOR WHICH THERE WAS AN ADEQUATE POST DEPRIVATION REMEDY BARRING A CONSTITUTIONAL CLAIM.

There is no question but that the hearings which occurred before the Dover Township Mobile Home Park Rent Leveling Board were unseemly due to the sparring between Mr. Baltarzuk (the Board Member), Mr. Rivkin (also a Board Member but the applicant in this case), and Mr. Levin (the Attorney for Mr. Rivkin). The issue, however, is not who was rude to whom first, but whether the conduct of the board member or Board was a

denial of due process rights and rises to the level of implication of a constitutional right.

It is important to note that the trial court did not determine that what the Board did or did not do was improper (PA81; PA85). Rather, the trial court affirmatively determined that the other members of the Rent Leveling Board were not exhibiting the prejudice Mr. Baltarzuk had (PA85). It was only determined that bias had been shown by one member of the Board, and that the chairperson had made a mistake in not removing that person. There is also no showing whatsoever of any individual bias or motivation arising from financial gain or any of the obvious principles of law which would dictate that a board member of any municipal entity was biased by virtue of personal interest or the like.

As the New Jersey Supreme Court saw the issue (as well as the Appellate Division), "Mr. Baltarzuk's conduct was not 'truly irrational.' " Mr. Baltarzuk appears to have mistakenly believed that it was his duty to serve as a tenant advocate. From this mistaken premise, Baltarzuk's actions were rational. Moreover, all of Baltarzuk's actions were related to the merits of the rent proceeding. The Board's original determinations about the eligibility, as capital improvements, of things such as a "Bob-Cat" loader were at least debatable and Baltarzuk was correct that the base rent of one of the tenants was mis-stated." (PA19-20).

In fact, no court has ever found that the Board itself was prejudiced. Only the one member was, at most.

In this context, we assert that the most that could ever have occurred is that there was a procedural due process violation. (Assuming, *arguendo*, that the Board accepts that proposition that a due process violation occurred which is not accepted. The

New Jersey Supreme Court does not accept the proposition that a substantive due process violation occurred, but at most a procedural due process violation occurred (PA20)).

With that perspective of what factually occurred, it becomes clear how and why the New Jersey Superior Court, Appellate Division determined that the conduct was truly random and fit the definition of *Paratt*. Further, the New Jersey Supreme Court reached the same logical conclusion, and then went further to describe the adequacy of the post-deprivation procedural due process violation remedy.

New Jersey's Prerogative Writs remedies are well developed. Prior to the New Jersey Constitution's re-writing in 1947, Writs practice was a substantial part of state law. With the adoption of the re-written Constitution, the New Jersey Constitution of 1947, Article VI, Section 5, paragraph 4, provides that: "Prerogative Writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by Rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary." This process has been codified into the New Jersey Court Rules as Rule 4:69-1 *et seq*.

As can be seen from this Petitioner's inability to accept the determination of the trial court that a remand was appropriate (by its cross appeal (PA6)) following that remand to its conclusion in this case projects the adequacy of New Jersey's post deprivation remedy.

As a result of the remand, the applicant Mobile Home Park, after an admitted delay, received a total of $45,731.09 of capital improvement out of $59,624.96 applied for (PB3;2). That is approximately 77% of what was originally sought. Other than the amount, what is also significant is that as a matter of law, the

same Mobile Home Park accepted the propriety of that 77% being all that they were entitled to.

Following the remand and the Board's decision on that remand, the Mobile Home Park commenced an additional Prerogative Writ action in which they sought to overturn and declare as arbitrary and capricious the Board's second decision. That action was the subject of a trial in the Superior Court, Law Division on the state standard of whether the Board's second decision was arbitrary, capricious, or unreasonable. Judgment was entered against the Mobile Home Park and in favor of the Board (RA 1a-3a). As a result of that determination, the whole of that second Prerogative Writ action, to dispute the full amount of the sought-after capital improvement increase, was then settled by a mutual dismissal (RA 4a-5a). Thus, the remand and the Prerogative Writ procedure gave this Mobile Home Park all that they were ever entitled to by way of monetary relief without the necessity of even considering a cause of action pursuant to 42 U.S.C. § 1983, *et seq.*

One of the entreaties that this Mobile Home Park makes on this Petition is that this case cries out for this Court's attention. They have failed, as we have tried to demonstrate, to describe from a factual point of view why that is so. It seems clear that when taken in the context of the New Jersey Supreme Court's understanding of the real dynamics of everyone's conduct at the rent leveling hearings, the activities of Mr. Baltarzuk were truly random and tailor-made for a *Paratt* analysis.

Although founded upon other constitutional provisions and/or rubrics, it is important to note that in the area of protection of real property rights pursuant to the Fifth and Fourteenth Amendment in both physical and regulatory taking cases, that this Court's case by case method is and has been preserved and followed. *See Yee v. City of Escondido* and *Lucas v. South*

Carolina Coastal Council. Other than waiving the banner of substantive due process, where is any reason set forth that substantiates why this case should be decided differently? If we, as the New Jersey Supreme Court counselled in quoting this Court, back off from the lofty labels of equal protection and substantive due process. (*See Allbright v. Oliver*, 510 U.S. 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994), *reh. denied*, __ U.S. __, 114 S. Ct. 1340, __ L. Ed. 3d __ (1994)) there is no reason to grant this Petition based on this case's merits.

This analogy has more currency than simply also dealing with taking issues as to real property cases, and why the principles that apply to each of the lines of cases should be equal. The line of the analogy as developed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) of what equals a legitimate state interest and the connection between the regulation and the state interest presents a *quid pro quo* and/or balancing. The New Jersey Prerogative Writs remedy provides the same because the most that this Petitioner is to bear is a delay in the remedy, and here we have seen that the delay gets them to no more than what they were ever entitled to in the first place. This is analogous to this Court's thinking that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 but not so when the taking is 95% of the whole, barring what the facts of the case compel. Here those facts compel a denial of the Petition.

CONCLUSION

For all of the reasons indicated, it is respectfully urged that the application for Petition for Writ of Certiorari should be denied, and the New Jersey Supreme Court decision sustained.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY FILED APRIL 6, 1994

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Attorneys at Law
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99080 225-6500
Attorneys for Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY

Docket No.: OCN-L-4205-92

CIVIL ACTION

David Rivkin, Edward Rivkin and Judith Rivkin t/a Galaxy Manor a New Jersey Partnership,

Plaintiffs,

vs.

Dover Township Rent Leveling Board, and Edward Baltarzuk,

Defendants.

JUDGMENT DISMISSING PREROGATIVE WRITS COUNTS I AND II

THIS MATTER having been tried on the 15th day of March, 1994, before the Honorable Thomas E. O'Brien, J.S.C., and the

Appendix A

firm of Levin, Shea, Pfeffer, McMahon & Russell, P.A., having represented the Plaintiffs, David Rivkin, Edward Rivkin, and Judith Rivkin, t/a as Galaxy Manor, with Reuel E. Topas, Esquire, appearing, and the firm of Babcock, Hennes & Bielory, P.C., representing Defendants, Dover Township Rent Leveling Board and Edward Baltarzuk, and Peter S. Hennes, Esquire, appearing, and it further appearing that the Court having read and considered the proofs in this matter, and having heard and considered argument of counsel; and the Court having issued a written decision; and for good cause shown;

IT IS therefore, on this 6th day of April, 1994, ORDERED as follows:

1. The Court has determined that the Dover Township Rent Leveling Board's decision on remand from Hearings held on May 5, 1992 and June 16, 1992, was reasonably reached and Plaintiffs application for payment of additional capital improvements are denied.

2. The Court has determined from an examination of the record of the Hearing dates of May 5, 1992 and June 16, 1992, and July 7, 1992, there was no bias affecting the Board's evaluation of Plaintiffs application for a rental increase. The Court has further determined, The Dover Township Rent Leveling Board arrived at this decision reasonably and logically and the Defendants did not exhibit bias or partiality.

3. The Court does not find the actions of the Dover Township Rent Leveling Board to be arbitary, capricious or unreasonable and, consequently, will not disturb its findings and Counts I and II, of the Complaint in Lieu of Prerogative Writs, are dismissed.

Appendix A

s/ Thomas E. O'Brien
Hon. Thomas E. O'Brien, J.S.C.

APPENDIX B — STIPULATION OF DISMISSAL FILED AUGUST 24, 1994

Reuel E. Topas, Esquire
Levin, Shea, Pfeffer, McMahon and Russell
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — OCEAN COUNTY

DOCKET #: OCN-L-4205-92

CIVIL ACTION

David Rivkin, Edward Rivkin and Judith Rivkin t/a Galaxy Manor a New Jersey Partnership

Plaintiff(s)

vs.

Dover Township Rent Leveling Board, and Edward Baltarzuk

Defendant(s)

STIPULATION OF DISMISSAL

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

Appendix B

By: s/ Courtland T. Babcock
Courtland T. Babcock, II
Attorney for Defendant

Babcock, Hennes & Bielory PC

Dated: 8/8/94

By: s/ Reuel E. Topas
Reuel E. Topas, Esquire
Attorney for Plaintiff

APPENDIX C — TOWNSHIP OF DOVER ORDINANCE

MOBILE HOME PARKS

Chapter 104

MOBILE HOME PARKS

ARTICLE I
General Provisions

§ 104-1. Definitions.

§ 104-2. License required.

§ 104-3. License fees.

§ 104-4. Application for license.

§ 104-5. Parking prohibited except in parks.

§ 104-6. Mobile homes park plan.

§ 104-7. Electricity and lighting.

§ 104 8. Location.

§ 104-9. Water supply.

§ 104-10. Service buildings.

§ 104-11. Laundry facilities.

§ 104-12. Sewage disposal.

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§ 104-13. Refuse disposal.

§ 104-14. Insect and rodent control.

§ 104 15. Fire protection.

§ 104-16. Oil-burning heating and cooking stoves.

§ 104-17. Fuels.

§ 104-18. Animals and pets.

§ 104-19. Alterations and additions.

§ 104 20. Recreation areas.

§ 104 21. Register of occupants.

DOVER CODE

§ 104-22. Supervision.

§ 104-23. Communicable diseases.

§ 104-24. Revocation of license.

§ 104-25. Posting of license and regulations.

§ 104-26. Violations and penalties.

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ARTICLE II
Rent Leveling; Rent Leveling Board

§ 104-27. Definitions.

§ 104-28. Determination of rents.

§ 104-29. Reduction for municipal code violations.

§ 104-30. Timing of increase; excess increase.

§ 104-31. Rent reduction procedure.

§ 104-32. Tax surcharges.

§ 104-33. Tax appeals.

§ 104-34. Additional rent increases.

§ 104 35. Rent Leveling Board.

§ 104 36. Rent equalization.

§ 104-37. Standards.

§ 104-38. Violations and penalties.

§ 104-39. (Reserved)

[HISTORY: Adopted by the Township Committee of the Township of Dover: Art. I, 8-22-61 as Ord. No. 606; Art. II, 10-26-76 as Ord. No. 1598, amended in its entirety 4-11-78 by Ord. No. 1733. Other amendments noted where applicable.]

Appendix C

GENERAL REFERENCES

Building Code — See Ch. 59.
Land use and development regulations — See Ch. 101.
Mobile food units — See Ch. 103.
Trailer camps — See Ch. 139.

Appendix C

Be it ordained by the Township Committee of the Township of Dover, County of Ocean and State of New Jersey, as follows:

ARTICLE I
General Provisions
[Adopted 8-22-61 as Ord. No. 606]

§ 104-1. Definitions.

As used in this Article, the following terms shall have the meanings indicated:

DEPENDENT MOBILE HOME — A mobile home which does not have a toilet or a bath or a shower.

DEPENDENT MOBILE HOME SPACE — A mobile home space which is designed to accommodate a dependent mobile home and does not have sewer and water connections to accommodate the toilet and the bath or shower in a mobile home.

INDEPENDENT MOBILE HOME — A mobile home that has a toilet and a bath or shower.

INDEPENDENT MOBILE HOME SPACE — A park space which has sewer and water connections designed to accommodate the toilet and bath or shower contained in an independent mobile home.

MOBILE HOME — Any portable structure or vehicle, so constructed and designed as to permit occupancy thereof for dwelling or sleeping purposes.

Appendix C

MOBILE HOME PARK — Any plot or ground upon which two (2) or more mobile homes, occupied for dwelling or sleeping purposes, are located, regardless of whether or not a charge is made for such accommodation.

PARK or CAMP — Mobile home park.

PERSON — Any individual, firm or corporation.

SERVICE BUILDING — A building housing toilet facilities with slop-water closet and laundry facilities and with separate bath and shower accommodations.

§ 104-2. License required.

A. Two (2) or more inhabited mobile homes shall be located in licensed mobile home parks.

B. It shall be unlawful for any person to maintain or operate within the limits of the Township of Dover, Ocean County, New Jersey, any mobile home park containing two (2) or more mobile homes unless such person shall first obtain a license therefor. All mobile home parks in existence upon the effective date of this Article shall within two (2) years thereafter obtain such license, and in all other respects comply with the provisions of this Article, with the exception of the minimum acreage requirement hereinafter set forth in § 104-6H. In the event any mobile home park in existence upon the effective date of this Article shall fail to comply with the provisions of this Article within said two-year term, any license heretofore issued to said mobile home park shall be revoked.

Appendix C

C. Licenses shall not be transferable without the consent of the licensing authority.

§ 104-3. License fees.

A. The annual license fee for each mobile home park shall be one hundred fifty dollars ($150.).

B. In addition to the aforementioned annual license fee of one hundred fifty dollars ($150.), the owner of each mobile park shall pay the sum of one dollar and fifty cents ($1.50) per week, or fraction thereof, for each mobile home located in said mobile home park, and it shall be the duty and responsibility of the owner to keep complete and accurate records of the rental for each mobile home in said park. This fee shall be paid to the Building Inspector at least once a month.

§ 104-4. Application for license.

A. Applications for a mobile home park license shall be filed with and issued by the Building Inspector. Applications shall be in writing, signed by the applicant, and shall contain the following:

(1) The name and address of the applicant.

(2) The location and legal description of the mobile home park.

(3) A complete plan of the park, showing compliance with § 101-6 of this ordinance, including plans for sewage and water facilities.

(4) Plans and specifications of all buildings and other improvements constructed and to be constructed in year for which application is made, to enable the issuing authority to determine if the proposed park will comply with legal requirements.

B. The application and all accompanying plans and specifications shall be filed in triplicate. The Building Inspector shall investigate the applicant and inspect the proposed plans and specifications and shall submit same to the Planning Board for its approval. If the applicant is found to be of good moral character and the proposed mobile home park will be in compliance with all provisions of this ordinance and all other applicable ordinances or statutes, the Planning Board shall approve the application, and upon completion of the park according to the plans, the Building Inspector shall issue the license, subject to prior approval of the Planning Board.

C. The said license shall not issue initially unless and until the applicant shall have secured a special use permit pursuant to Ordinance No. 479,[1] as amended and supplemented. It is recognized that upon application for such special use permit under said Ordinance No. 479 and pursuant to the statutes in such case made and provided, hearing as required by law will be held and required notice given. The necessary action to be taken by the Planning Board hereunder shall not require a public hearing.
[Added 3-27-62 by Ord. No. 631]

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1. Editor's Ncte: Ord. No. 479 was repealed and replaced by Ord. No. 965, which is included as Ch. 145, Zoning.

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§ 104-5. Parking prohibited except in parks.

Mobile homes shall not be parked on any public thoroughfare, street, alley or public place[2] in the Township of Dover, Ocean County, New Jersey, for longer than twelve (12) hours when no emergency for repairs exists.

§ 104-6. Mobile homes park plan.

The mobile home park shall conform to the following requirements:

A. The park shall he located on a well drained site, properly graded to insure rapid drainage and freedom from stagnant pools of water. Walks, driveways and retaining walls shall be constructed as not to interfere with drainage. Drainage shall be away from mobile home spaces, service buildings and recreational areas. Storm water shall not drain into sanitary sewers.

B. Mobile home spaces shall be provided consisting of a minimum of two thousand eight hundred (2,800) square feet for each space, which shall be at least thirty-five (35) feet wide and clearly defined. Mobile homes shall be so parked on each space that there shall be at least twenty-foot clearance between mobile homes. No mobile home shall be located closer than fifty (50) feet from a dwelling and closer than ten (10) feet from any property line bounding the park, or closer than one hundred (100) feet from any public street or highway right-of-way line.

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2. Editor's Note: As to traffic regulations, see Ch. 143, Vehicle and Traffic.

Appendix C

C. All mobile home spaces shall abut upon a surfaced bituminous concrete road of not less than thirty (30) feet in width, with curbing in accordance with township specifications.

D. Surfaced macadam walkways not less than three (3) feet wide shall be provided from the mobile home spaces to the service buildings.

E. Each park shall provide service buildings to house toilet facilities, bathing facilities, laundry facilities and other sanitary facilities as hereinafter more particularly prescribed.

F. Safety and convenience shall be major consideration in the layout of driveways, walks and parking areas within the mobile home park, and driveways shall be continuous insofar as possible.

G. The number of parking spaces shall equal the number of mobile home spaces. These must be provided in special parking areas.

H. No license shall be granted to any mobile parking unit on plan comprising less than ten (10) acres, provided, however, that this provision of minimum acreage (and only this provision) shall not apply to any trailer courts, parks or mobile home parks duly licensed and in existence prior to the adoption of this ordinance, in accordance with township and New Jersey Codes.

I. The subdivision of lots in the mobile park unit shall avoid a grid pattern.

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J. All plans shall provide for landscaping.

K. All plans shall indicate a ten-foot buffer zone along side lines and rear lines, with adequate landscaping or shrubbery.

L. Prior to the approval of any plan, the Planning Board shall require that the applicant shall post a surety bond in form required by the township for subdivisions, and in an amount to be fixed by the Planning Board, to cover the cost of installation of roads and in compliance with §§ 104-6, 104-7, 104-9, 104-10, 104-11 and 104-12.

M. Neither the establishment of any road on said plan or the requirement of any bond shall relieve the owner of the park from the maintenance of all roads as shown on said plan.

N. It shall be the duty and responsibility of the owner to remove all snow from roads and walks in park or camp within twenty-four (24) hours after the cessation of fall. In the event that the owner fails so to do, the township shall have the right to effect such snow removal as may be required for the health, safety and welfare of the occupants of said park, and the cost thereof shall be charged against the owner for said snow removal. Failure to pay the cost of said snow removal within thirty (30) days after demand by the township shall be cause for the revocation of the license for said park.

O. Said plan shall also provide for adequate drainage of the park and all requirements of drainage off-site, in accordance with the township rules and regulations, and ordinances governing same shall be complied with.

Appendix C

§ 104-7. Electricity and lighting.

A. Every mobile home park shall be provided with electric power. An electric outlet supplying one hundred ten to one hundred fifteen (110-115) volts should be provided for every mobile home space. The outlets shall be weatherproof, and in easy reach of parked mobile home. In no instance should any power line across the mobile home area be less than eighteen (18) feet above the ground. All electric wiring in the mobile home park should be in accordance with the Ocean County and New Jersey Codes, or in the absence of local codes, then in accordance with the National Electrical Code. Adequate overcurrent protection shall be provided on all circuits. Service drops to each mobile home space shall be weatherproof, insulated and not smaller than two (2) Number 8 wires.

B. Street and yard lights sufficient in number and intensity to permit safe movement of vehicles and pedestrians shall be provided. Lights shall be at least twenty-five (25) watts, spaced at intervals of at least one hundred (100) feet and located approximately fifteen (15) feet from the ground, and shall be effectively related to buildings, walks, trees, steps and ramps. Lights shall be kept burning from sunset to sunrise.

§ 104-8. Location.

Mobile home parks shall be located only in rural, highway, business and industrial zones.

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§ 104-9. Water supply.

A. All mobile home parks shall be connected with an approved public water supply where available, supplied to each mobile home space by pipe.

B. Where a public water supply is not available, a suitable private water supply shall be developed that meets standards prescribed by the New Jersey Department of Health as safe for drinking purposes. Water shall be piped to each mobile home space.

C. Water distribution and storage facilities shall be adequate to supply a continuous year-round frost-free water supply of at least one hundred fifty (150) gallons per day per mobile home space, at a rate of six (6) gallons per minute, with a residual pressure of twenty (20) pounds per square inch. Wells shall be at least ten (10) feet deep and located at least two hundred (200) feet from any privy, septic tank or cesspool and/or as approved by a health officer, and as required by local ordinance.

D. Dependent mobile home spaces shall be provided with sanitary facilities in service buildings not less than twenty-five (25) or more than one hundred fifty (150) feet from any dependent mobile home, as outlined in § 104-10 below. Such service buildings shall provide abundant hot water supply at all times for bathing, washing and laundry facilities.

§ 104-10. Service buildings.

Each park renting space to dependent mobile homes shall be

provided with toilets, baths or showers, slop sinks and other sanitation facilities, which shall conform to the following requirements:

A. Toilet facilities of men and women shall be either in separate buildings at least twenty (20) feet apart, or shall be separated, if in the same building, by a soundproof wall.

B. Flush toilets shall be placed in conveniently located buildings not more than a distance of two hundred (200) feet from any dependent mobile home. The building shall be well lighted at all times, ventilated with screened openings and constructed of moistureproof materials permitting satisfactory cleaning. The floors shall be concrete or similar materials, slightly pitched to a floor drain. Toilets shall be enclosed in separate compartments with doors, and have a minimum width of two (2) feet eight (8) inches. Toilet facilities for women shall consist of not less than one (1) flush toilet for every five (5) dependent mobile home spaces, one (1) shower or bath for every five (5) dependent mobile home spaces, and one (1) lavatory with hot and cold running water for every five (a) dependent mobile home spaces. Each toilet and bathtub shall be in a private compartment.

C. Toilet facilities for men shall consist of not less than one (1) flush toilet for every five (5) dependent mobile home spaces, one (1) shower or bathtub for every five (5) dependent mobile home spaces, and one (1) lavatory with hot and cold running water for every five (5) dependent mobile home spaces. Each toilet, shower and bathtub shall be in a private compartment.

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D. An independent mobile home may be parked on a dependent mobile home space, but the requirements of § 101-10A, B and immediately hereinabove specified shall not thereby be affected.

E. A dependent mobile home may be parked on an independent mobile home space, but in such event such space shall be regarded as being a dependent mobile home for the purpose of determining compliance with the provisions of § 104-10 A, B and C.

F. Service buildings housing the toilet facilities shall be permanent structures complying with all applicable ordinances and statutes regulating buildings, electrical installations and plumbing and sanitation systems, and shall be located not closer than twenty-five (2a) feet, not farther than one hundred fifty (150) feet, from any dependent mobile home space.

G. Each service building shall contain at least one (1) slop sink located in a separate compartment.

H. The service buildings shall be well lighted at all times of the day and night, shall be well ventilated with screened openings, shall be constructed of such moistureproof material, including the painted woodwork, as shall permit repeated cleaning and washing, and shall be maintained at a temperature of at least sixty-eight degrees Fahrenheit (68° F.) during the period from October 1 to May 1. The floors of the service building shall be of water-impervious material and shall slope to a floor drain connected with the sewerage system.

Appendix C

I. All service buildings, mobile homes, mobile home spaces and the grounds of the park shall be maintained in a clean, sightly condition and kept free of any conditions that will menace the health of any occupant, of the public or constitute a nuisance.

§ 104-11. Laundry facilities.

A. The laundry facilities shall be provided in the ratio of one (1) double laundry tub and ironing board, or one (1) standard washer and drier, for every ten (10) mobile home spaces. An electric outlet [one hundred ten (110) voltage] shall be located conveniently near the ironing board. Drying spaces shall be provided sufficient to accommodate the laundry of the park occupants. The service building housing the laundry facilities shall be a permanent structure complying with all applicable ordinances and statutes regulating buildings, electrical installations and plumbing and sanitation systems. Hot water shall be provided for clothes-washing equipment.

B. Outside drying space adjacent to the service building or other clothes-drying facility shall be provided. A minimum of fifty (50) square feet per mobile home space shall be provided in the area used for outside clothes drying.

§ 104-12. Sewage disposal.

A. A system of sanitary sewerage shall be provided in mobile home parks, and all waste and soil lines discharging from buildings and mobile homes shall be connected thereto. Each mobile home space shall be provided with a trapped sewer below frost lines at least four (4) inches in

diameter and sloped so as to provide a minimum flow velocity of not less than two (2) feet per second when flowing half full. The sewer shall be provided with suitable fittings, so that a water and gaslight connection can be made between the mobile home drain and the sewer connection. Such individual home connections shall be so constructed that they can be closed when not linked to a mobile home, and shall be trapped in such a manner as to maintain them in an odor-free condition. Sufficient cleanouts, handholes and manholes shall be installed in sewer systems so as to maintain serviceable conditions. Sewer lines shall be located in a separate trench from water mains.

B. All sewers shall discharge into a public sewerage system where feasible, or where possible. In the absence of a public sewerage system, adequate private sewage disposal and treatment facilities shall be installed to treat a minimum average of one hundred fifty (150) gallons per day per mobile home space of ultimate capacity of the park. The treatment facility shall be located so that it shall not create a health or odor nuisance to the park or adjacent property occupants, or discharge untreated effluents in any body of water.

C. All sewerage systems shall meet applicable local plumbing and sanitary codes, shall be approved by the Health Officer and/or appropriate officials, and shall meet standards of the New Jersey Health Department.

§ 104-13. Refuse disposal.

A. A fly- and watertight metal garbage can shall be provided for each mobile home space adequate to permit

disposal of all garbage and rubbish. Garbage shall be collected at least twice a week.

B. Racks and holders shall be provided for all refuse containers. Such container racks shall be designed so as to prevent containers from being tipped, to minimize spillage and container deterioration, and to facilitate cleaning around them.

§ 104-14. Insect and rodent control.

A. Insect and rodent control measures to safeguard public health, as recommended by the Health Officer or other authority, shall be applied in the mobile home park.

B. Effective larvicidal solution may be recommended by the Health Office for fly- or mosquito-breeding areas which cannot be controlled by other, more permanent measures.

C. Accumulations of debris which may provide harborage for rodents shall not be permitted in the mobile home park.

D. When rats or other rodents are known to be in or near to the mobile home park, the operator shall take definite action under direction by appropriate health authority to exterminate them.

E. Suitable measures as recommended by the Health Officer shall be taken by the mobile home park operator to control other insects and obnoxious weeds.

Appendix C

§ 104-15. Fire protection.

A. Fire alarms and instructions. Provision shall be made for giving a general alarm in case of fire. A bell, iron hoop or a similar manually operated device may be used for this purpose. It shall be the duty of the mobile home park owner or operator to instruct all tenants of means of summoning fire-fighting apparatus, police, medical help, and of the proper operation of fire extinguishers. A public telephone without the necessity of inserting a coin shall be available at all times to summon fire, police and other protective services. Up-to-date lists of telephone numbers of emergency services shall be permanently displayed near the telephone.

B. Fire extinguishers. Every mobile home in the park shall be equipped with at least one (1) approved hand-operated fire extinguisher of a type suitable for use on oil fires, preferably the foam type. The extinguisher shall be installed on the inside of the mobile home in a fixed location, preferably near a door, but in no case in close proximity to the cooking or heating stove. In the absence of a system of yard hydrants and hose, a complement of approved fire extinguishers on wheels for every twenty (20) mobile home spaces shall be provided, located not farther than one hundred fifty (150) feet from any mobile home. Each complement of extinguishers shall contain one (1) foam type extinguisher (with antifreeze) of a two-and-one-half-gallon rated capacity, for Class A type fires; and at least one (1) approved carbon-dioxide dry chemical or vaporizing liquid extinguisher of at least twenty-five-pound capacity for Class B oil-type fires. All extinguishers shall be kept in good operating condition and checked yearly by an appropriate authority.

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C. Mobile home park areas shall be kept free of litter, rubbish and other flammable material.

D. Means of egress. Two (2) doors, one (1) located at each end of the mobile home, shall be provided on the right side of the body. Doors and screen doors shall be of the hinged type, opening outwardly from the inside locks, when provided, shall be of the type that permits opening from the inside by the simple operation of a knob or lever or by pressure against the door.

§ 104-16. Oil-burning heating and cooking stoves.

A. Oil-burning cooking and heating stoves shall be of an approved type and shall be provided with flue connections to the outside of the mobile home. Flues shall penetrate the roof of the mobile home through a weathertight sheet metal shield or roof jack which shall provide a clearance of at least two (2) inches between the flue and combustible roof material, if approved outlet flues are provided. A clearance of at least six (6) inches shall be provided if metal flues are used. Downdraft diverters shall be provided on all vents from oil-burning stoves.

B. Oil-burning stoves for heating purposes may provide for attachment to fuel tanks located outside and separate from the mobile home. Auxiliary oil storage tanks, when provided, shall be so located as to require filling and drainage on the outside of the mobile home and shall be securely fastened in position in a place readily available for inspection. When installed in closed compartments outside the mobile home, such compartment shall be ventilated at the bottom.

C. No gasoline or portable stove equipment shall be permitted. Fires shall be made only in approved stoves, incinerators and other equipment intended for such purposes.

§ 104-17. Fuels.

Cylinders containing liquefied petroleum gas or oils to be used as fuel by mobile home occupants should be connected to the stove or heaters of the mobile home by copper or other metallic tubing, to provide leakproof connections. The cylinders should be securely fastened in place, not less than five (5) feet from any coach exit. State and local codes applicable shall be followed.

§ 104-18. Animal and pet.

No owner or person in charge of any dog, cat or other pet animal shall permit it to run at large.

§ 104-19. Alterations and addition.

A. No permanent additions of any kind shall be built onto nor become part of any mobile homes. Skirting of mobile homes is permissible, but such skirting shall not attach the mobile home permanently to the ground, create a fire hazard or provide a harborage for rodents.

B. The wheels of the mobile home shall not be removed, except temporarily when necessary for repairs. Jacks or stabilizers may be placed under the frame of the mobile home to prevent movement on the springs while the mobile home is parked and occupied.

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§ 104-20. Recreation areas.

At least one hundred (100) square feet per each mobile home space shall be made available in one (1) or more areas for recreational uses. These areas shall be located so as to be free of traffic hazards.

§ 104-21. Register of occupants.

A. It shall be the duty of the licensee to keep a register containing a record of all mobile homes, owners and occupants located within the park. The register shall contain the following information:

(1) Name and address of each occupant, and age if under twenty-one (21).

(2) The make, model and year of all automobiles and mobile homes.

(3) License number and owner of each mobile home and automobile by which it is towed.

(4) The state issuing such license.

(5) The dates of arrival and departure of each mobile home.

(6) Place of previous residence.

(7) The permanent address.

(8) Forwarding address.

B. The park operator shall keep the register available for inspection by township officials at all times. The register records shall not be destroyed for a period of three (3) years following the date of registration.

§ 104-22. Supervision.

A responsible attendant, caretaker, owner or operator shall be in charge at all times to keep the mobile home park, its facilities and equipment, in a clean, orderly and sanitary condition, and he shall be answerable with the licensee for any violation of the provisions of this Article.

§ 104-23. Communicable diseases.

It shall be the duty of each park owner or operator to report promptly to the Health Officer or other officials all cases of persons and animals infected or suspected of being infected with a communicable disease.

§ 104-24. Revocation of license.

The designated authority or Health Officer shall make inspections of the park to assure compliance with this Article, and parks shall be open for such inspections at all reasonable hours. In case of noncompliance with any provisions of this Article, the designated authority shall serve warning to the licensee. Thereafter, upon failure of the licensee to remove said violation, the Township Committee shall hold hearings on the matter, and upon determination of noncompliance, revoke said license. The license may be reissued if the circumstances leading to the revocation have been remedied, and the park can be maintained and operated in full compliance with the law.

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§ 104-25. Posting of license and regulations.

The license certificate and a copy of this Article shall be conspicuously posted in the office or on the premises of the mobile home park at all times.

§ 104-26. Violations and penalties.

Any person violating this Article shall be fined not less than twenty-five dollars ($25.) nor more than one hundred dollars $100.) for such offense or, in default of payment of the fine and costs imposed, shall be sentenced to the county jail for a period not exceeding five (5) days. Each day that a violation is permitted to exist shall constitute a separate offense. Payment of the fine shall not constitute compliance with the Article.

ARTICLE II

Rent Leveling; Rent Leveling Board
[Adopted 10-26-76 as Ord. No. 1598;[1] amended in its entirety 4-11-78 by Ord. No. 1733]

§ 104-27. Definitions.

The following definitions shall apply to this Article:

AVAILABLE FOR RENT TO TENANTS — Fit for habitation, as defined by the statutes, codes and ordinances

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1. Editor's Note: This ordinance also provided for the redesignation of former Ch. 104 as Art. I of this chapter and repealed former § 104-27, Severability § 104-28, Conflict of ordinances; and § 104-29, When effective.

in full force and effect in the State of New Jersey, County of Ocean and Township of Dover, and occupied or unoccupied and offered for rent.

CONSUMER PRICE INDEX — The consumer price index (all items) for the region of the United States of which the Township of Dover, New Jersey, is a part, published periodically by the Bureau of Labor Statistics, United States Department of Labor.

MOBILE HOME SPACE — Includes that portion of a mobile homes park rented or offered for rent for the purpose of parking or positioning a trailer or mobile home for living and dwelling purposes, to one (1) or more tenants or family units, together with all the privileges, services, equipment, facilities and improvements connected with the use or occupancy of such portion of the property. Mobile home spaces which are newly constructed and rented for the first time are exempted, and the initial rent may be determined by the owner. All subsequent rents will be subject to the provisions of this Article.

MOBILE HOMES PARK — As defined in § 104-1, Definitions, of Article I of this chapter.

RENTAL INCOME — The payable rent charged and received for the mobile home space over the previous twelve-month period, exclusive of any of the following: all real property taxes, space fees or license fees charged by the Township of Dover pursuant to any duly adopted ordinance and any cost of supplied utilities and any increase for hardship or major capital improvements as permitted by § 104-34 hereof.

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SERVICE — Mailing, to the home address by certified mail, return receipt requested, or in-hand delivery certified to by affidavit, or an acknowledgement of service executed by the person served, which affidavit or acknowledgement of service must be retained in the records of the person causing service.

SUPPLIED UTILITIES — Fuel, electrical, water and sewer services supplied directly to the individual mobile home for which services the landlord is responsible to the supplier for payment.

§ 104-28. Determination of rents.

A. Establishment of rents between a landlord and a tenant to whom this Article is applicable shall hereafter be determined by the following provisions:

(1) At the expiration of the tenancy for a mobile home space, no landlord may request or receive any increase in the rental income and additional charges for that mobile home space from any tenant, new or continuing, which is greater than a combination of the following:

(a) Any increased cost to the landlord for supplied utilities.

(b) Any increased cost to the landlord in mobile home space fees or license fees charged by the Township of Dover pursuant to any duly adopted ordinance.

(c) Any amount equal to three and one-half percent (3 1/2 %) of the previous twelve-month rental income for the mobile home space or the percentage increase in the consumer price index over the twelve-month period ending one hundred twenty (120) days prior to the date of the application for said increase, whichever shall be less.

(2) Any new or continuing tenant at the termination of a tenancy shall not suffer or be caused to pay any rent increase for the mobile home space in any twelve-month period which exceeds the above permitted increase for the twelve-month period.

B. No landlord may request or receive of the tenants any increase in rental income or additional charges except as provided by this section and until such time as the landlord shall have obtained approval in writing from the Rent Leveling Board, as hereinafter established, for said increase. Furthermore, there shall be only one (1) increase granted per landlord per mobile homes park per calendar year, for each of the increases permitted by this section, which request and decision shall be binding upon all tenancies of that particular mobile homes park which expire thereafter during said calendar year, unless as otherwise provided herein. The landlord shall notify the Rent Leveling Board in writing at least sixty (60) days prior to the effective date of any increase proposed pursuant to the provisions of this section. At the same time, a copy of said notice shall be served upon any tenant who may be affected by the increase applied for. Upon receipt of said notice, and where the increase sought is based on the terms of

Subsection A(1)(a) or (c) herein, the Rent Leveling Board shall schedule a hearing on said increase, and the landlord shall post, in a conspicuous place in or about the park, a notice of said hearing date-at least five (5) days prior to the proposed date of hearing. Where the increase sought is based upon the terms of Subsection A(1)(b) herein, no hearing shall be scheduled, and the increase shall become effective on the date specified in said notice, if all other applicable provisions of this Article are complied with.

§ 104-29. Reduction for municipal code violations.

Where a mobile homes park or any part thereof is being operated in violation of municipal codes and where such violation adversely affects habitability, any affected tenant or tenants may apply to the Board for a reasonable reduction in rent, commensurate with any such effect on habitability; whereupon the Board shall duly notify the landlord and schedule the matter for a hearing. If, as a result of such a hearing, the Board determines that a violation of a municipal code exists and that such violation affects habitability, it may grant a reasonable reduction in rent to the affected tenant or tenants, which rent shall remain in effect until the landlord corrects the said violation or violations.

§ 104-30. Timing of increase; excess increase.

Any rental income or additional charge increase at a time other than at the expiration of a tenancy or termination of a periodic tenancy shall be void, except as otherwise provided in this Article. Any rental income or additional charge increase in excess of that authorized by the provisions of this Article shall be void.

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§ 104-31. Rent reduction procedure.

A tenant shall be entitled to a rent reduction from a landlord because of a decrease in the municipal property taxes or cost of supplied utilities or any decrease in space fees or license fees charged by the municipality. The reduction shall not exceed that amount authorized by the following provisions:

A. Where the decrease consists of a decrease in the municipal property tax due to aid received from the State Aid for Schools Fund and where said decrease is subject to the provisions of P.L. 1976, c. 63 N.J.R.S. 54:4-62 et seq.), as may be amended from time to time, the landlord shall make such rebate upon such terms as P.L. 1976, c. 63, provides.

B. Where the decrease consists of a decrease in the municipal property tax other than that decrease provided for in Subsection A above, the landlord shall divide the decrease in the present tax over the tax for the previous year by the total number of completed mobile home spaces in the mobile homes park. The decrease each tenant is entitled to shall be a credit to rent in twelve (12) monthly installments commencing September of each year. Any tenant entitled to a rent decrease hereunder shall be served with a notice of the calculations involved in computating such reduction and the effective date of such reduction.

C. Where the decrease consists of a decrease in the cost of supplied utilities, space fees or license fees, the landlord shall divide the decrease in the present cost of supplied utilities, mobile home space fees or license fees over the cost of supplied utilities, mobile home space fees

or license fees of the previous year by the total number of completed mobile home spaces in the mobile homes park to obtain the decrease per space. The decrease each tenant is entitled to shall be a credit to rent on twelve (12) monthly installments commencing from the effective date of said reduction. Any tenant entitled to a rent decrease hereunder shall be served by the landlord with a notice of the calculations involved in computing such reduction and the effective date of such reduction.

§ 104-32. Tax surcharges.

A landlord shall be entitled to a rent surcharge for any increase in municipal property taxes. Any landlord seeking a surcharge for property taxes shall serve the tenants with a notice, at least thirty (30) days prior to the date on which said surcharge is to be effective, of the calculations involved, including the property tax for the mobile homes park for the year immediately preceding the year for which the tax surcharge is sought, and the increase in the present tax over the tax for the preceding year divided by the total number of completed mobile home spaces in the mobile homes park. The tax surcharge each tenant is liable for shall be paid in twelve (12) monthly installments commencing September of each year.

§ 104-33. Tax appeals.

A. In the event that a municipal property tax appeal is taken by the landlord and the landlord is successful in said appeal and the taxes reduced, the tenants involved shall receive fifty percent (50%) of said reduction after the landlord's costs of securing said tax reduction have been deducted. The landlord shall receive the remaining benefits

of the tax reduction. Thereafter, in succeeding years, the benefit of such successful tax appeal shall be divided evenly between the tenants and the landlord.

B. Any such successful landlord shall serve the tenants, within thirty (30) days after receipt of the judgment, with a notice of the calculations involved, including an itemization of the costs of securing said reduction and the reduction each tenant is entitled to, determined by dividing one-half (1/2) of the remainder of the amount of said tax reduction by the number of completed mobile home spaces in the mobile homes park.

§ 104-34. Additional rent increases.

A. Hardship. A landlord who finds that present rental income and additional charges from the mobile homes park on which he seeks relief hereunder are insufficient to cover the cost of payments on a first mortgage and any subsequent mortgages used to improve and upgrade the mobile home park and/or payments for maintenance and/or all operating costs and at the same time ensure the landlord a just and reasonable return may appeal to the Rent Leveling Board for an increase in rental income. Following a hearing, the Board may grant the landlord a hardship rent increase to meet these needs after considering the proofs presented by the landlord, the condition of the mobile homes park and degree of hardship to the landlord. Prior to any such appeal to the Board, a landlord must post, in a conspicuous place in and about the mobile homes park, a notice of said appeal, setting forth the basis for said appeal. Each tenant to be affected must, at the same time, be served with notice of the appeal. The landlord must, thereafter, post a notice of the

appeal hearing date in a conspicuous place at the mobile homes park at least five (5) days prior to the appeal hearing date. If said increase is granted, it shall not be considered rental income and not calculated in allowable increases as otherwise set forth in this Article. **[Amended 5-27-80 by Ord. No. 1927]**

B. Major improvements. A landlord may seek an additional charge for major capital improvements. "Capital improvements" shall be any item considered as such under the Federal Internal Revenue enactments and regulations. Prior to filing an appeal with the Rent Leveling Board, the landlord must serve each tenant with a notice of the total cost of the completed capital improvement, the number of useful years of life of the improvement as claimed by the landlord for purposes of depreciation for income tax purpose, the average cost, including debt service, of the improvement (calculated by dividing the cost of the major improvement by the total number of completed mobile home spaces in the mobile homes park) and the capital improvement surcharge he is seeking from each tenant. The landlord seeking a capital improvement surcharge shall appeal for said surcharge to the Rent Leveling Board, which shall determine, after the landlord has served notice to the affected tenants of a hearing date, if said improvement is a major improvement and, if so, the amount of increase granted for such major improvement and establish the conditions of such increase. If said increase is granted, it shall not be considered rental income and not calculated in allowable increases as otherwise set forth in this Article. In any event, no increase granted by authority of this subsection shall exceed ten percent (10%) of the tenants' rental income, unless said increase or capital improvement is mandated by law.

Appendix C

§ 104-35. Rent Leveling Board.

A. Board created.

(1) There is hereby created a Rent Leveling Board within the Township of Dover. The Board shall consist of five (5) regular members of whom one (1) shall be a mobile homes park landlord and one (1) a tenant of a mobile homes park. The Chairman shall be chosen by the Township Committee from among the nonland-lord/nontenant members; the Board shall designate its own Vice Chairman to serve, when needed, as the Acting Chairman. All members shall be appointed by the Township Committee and shall serve, commencing with the initial appointments, terms of one (1) year, two (2) years, three (3) years, four (4) years and five (5) years, respectively, and thereafter terms of five (5) years, commencing the first day of January of the year of their appointments.

(2) There shall be six (6) alternates appointed by the Township Committee to serve in the absence or disqualification of a corresponding regular member, two (2) of whom shall be neither a landlord nor a tenant of a mobile homes park, two (2) of whom shall be a landlord and two (2) of whom shall be a tenant of a mobile homes park, but neither alternate landlord nor alternate tenant members of the Board shall be of the same mobile homes park as a regular member. Three (3) of the alternates, one (1) from each of the categories above mentioned, shall be appointed for a term to expire on December 31, 1978, and their successors appointed for terms of two (2) years thereafter; the remaining three (3) alternates shall be appointed for a term to expire on December 31, 1979, and their successors

appointed for terms of two (2) years thereafter. In the event that any regular member of the Board shall be unable to attend any meeting, the senior alternate of that category shall attend in the place and stead of the absent regular member. In the absence of both the regular member and the senior alternate member, the junior alternate member shall serve in the place and stead of the regular member. Until December 31, 1978, the senior alternate member shall be that member whose term expires December 31, 1978.

(3) Vacancies shall be filled for the balance of the terms. Members shall not hold any other elective office or elective position in the township. The members of the Board shall serve without compensation but shall be reimbursed for reasonable and necessary expenses. The Board shall have available to it such clerical assistance, legal assistance and auditors' services as are budgeted annually by the Township Committee. No member shall vote upon or enter into discussions as to any matter in which he has a direct or indirect interest, financial or otherwise.

B. Powers and duties.

(1) The Rent Leveling Board is hereby granted and shall have and exercise, in addition to other powers herein granted, all the powers necessary and appropriate to carry out and execute the purposes of this Article, including but not limited to the following:

(a) To issue and promulgate such rules and regulations as it deems necessary to implement the purposes of this Article, such rules and regulations being subject to the approval of the Township Committee.

(b) To supply information and assistance to landlords and tenants to help them comply with the provisions of this Article.

(c) To hold hearings and adjudicate applications from landlords for additional rental income or charges as hereinafter provided.

(d) To hold hearings and adjudicate applications from tenants for reduced rental income or charges as herein provided.

(2) Said Board shall give both the landlord and tenant reasonable opportunity to be heard before making any determination and shall base its determination on the reasonable, credible evidence before it, although the strict rules of evidence shall not apply. The Board shall render an oral decision within thirty (30) days after the close of hearings. The Board shall maintain minutes of its hearings and/or meetings.

§ 104-36. Rent equalization.

Where there exists a disparity in rents within a mobile homes park for substantially similar facilities due to the enactment of this Article combined with the differing expirations and renewals of certain tenancies, any affected party may petition the Board for a hearing consistent with the terms of this section. If, as a result of such hearing, the Board finds a disparity in rents for the reasons aforesaid, the Board may, in its discretion, raise those low rents to the level of the majority of rents within the mobile homes park for similar facilities. A petitioner requesting such hearing shall serve every party to be

affected with a written notice of the reasons for his petition, including the calculations involved in the proposed increase, at least sixty (60) days prior to the proposed effective date of any such increase. Upon the scheduling of a hearing on such petition, the petitioner shall post, in a conspicuous place in or about the mobile homes park to be affected, a notice of said hearing date at least five (5) days prior to the proposed date of hearing and shall serve every party to be affected with such notice of hearing date.

§ 104-37. Standards.

A. During the term of this Article, the landlord shall maintain the same standards of service, maintenance and equipment in the mobile homes park or mobile home spaces as he provided or was required to do by law or lease, written or unwritten, as of the original effective date of this Article.

B. Where the landlord fails to maintain such standards and where such failure results in a substantial reduction of such standards, any tenant may appeal to the Board for a reasonable reduction in rent, commensurate with such reduction in standards; whereupon the Board shall duly notify the landlord and schedule the matter for hearing. If, as a result of such hearing, a reduction in rent is granted, it shall take effect as specified by the Board and shall remain in effect until the landlord proves the standards are being maintained.

§ 104-38. Violations and penalties.

A willful violation of any provisions of this Article, including but not limited to the willful filing with the Rent Leveling Board of any material misstatement of fact, shall be

punishable by a fine of not more than five hundred dollars ($00.) or imprisonment for not more than ninety (90) days, or both, in the discretion of the court, for each day the violation continues. A violation affecting more than one (1) leasehold shall be considered a separate violation as to each leasehold.

§ 104-39. (Reserved)

MOTION FILED
JUN 10 1996

No. 95-1980

In the

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN,
JUDITH RIVKIN, t/a GALAXY MANOR,
A New Jersey Partnership,
Petitioners,

v.

DOVER TOWNSHIP RENT LEVELING BOARD,
Respondent.

Petition for Writ of Certiorari
to the New Jersey Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for writ of certiorari filed by David Rivkin, *et al.* Consent to the filing of this brief has been granted by counsel for petitioners and has been lodged with the Clerk of this Court. Respondent, Dover Township Rent Leveling Board, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 contributors and supporters located throughout the Nation and maintains its principal office in Sacramento, California. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees, through its legal review committee, has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous cases concerning constitutional protections for property rights before this Court and other courts representing both amicus curiae and property owners. Many of these cases involved the Due Process Clause, including *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990), in which PLF attorneys were counsel of record, and *Pennell v. City of San Jose*, 485 U.S. 1 (1988), in which PLF participated as amicus curiae. PLF also participated as amicus curiae before this Court in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).[1]

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[1] PLF has also participated in virtually every major case before this Court in the last two decades involving land use and the Takings Clause. For example, PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304 (1994).

PLF also has a Rent Control Project which is actively litigating procedural and substantive infirmities, of constitutional dimensions, in the administration of local rent control laws by four California cities. Attorneys in PLF's Rent Control Project are counsel of record in *Santa Monica Beach, Ltd. v. Superior Court*, 42 Cal. App. 4th 1228 (1996), *review granted* by California Supreme Court. PLF also participated as amicus curiae before this Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Specifically, PLF will demonstrate that the court in this case departed from the commonly accepted requirement, in conflict with a number of federal appellate courts, that administrative adjudications affecting private property rights be justified by an articulated and legitimate rationale. PLF will also show that the court's holding is inconsistent with the precedents of this Court when the New Jersey court ruled that postdeprivation remedies can

insulate government agencies from constitutional liability for a procedurally deficient hearing that deprived citizens of their property rights.

DATED: July ___, 1996.

Respectfully submitted,

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No. 95-1980

In the

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN,
JUDITH RIVKIN, t/a GALAXY MANOR,
A New Jersey Partnership,

Petitioners,

v.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

Petition for Writ of Certiorari to the New Jersey Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

When petitioners David, Edward, and Judith Rivkin, in partnership as Galaxy Manor (Rivkins), submitted an application for a rent increase to respondent Dover Township Rent Leveling Board (Rent Board) in May, 1990, they

expected a simple, noncontroversial process. They had records demonstrating expenses of $59,624.96; the Rivkins believed these were for capital improvements that could be recovered through an increase in the rents paid by the tenants of their mobile home park, under the local mobile home rent control ordinance. The job of the five members of the Rent Board was clear: to review the application and determine how many of the expenses fit in the category of major capital improvements.

But over the course of four public hearings--in June, July, August, and October, 1990--the Rivkins found that instead of being composed of five neutral arbiters of their claims, the Rent Board contained one member who viewed his role as "one of advocacy rather than adjudication." *Rivkin v. Dover Township Rent Leveling Board*, 143 N.J. 352, 358 (1996); Appendix (App.) A to Petition for Writ of Certiorari (Pet.) at 4a. The Rent Board is comprised of three members from the general public, one mobile home park owner, and one mobile home park tenant. The tenant member, one Mr. Baltarzuk--who happened to reside at the very park for which the rent increase was sought--"stated on the record that it was his function to 'serve the people of the mobile home park.'" *Rivkin*, 143 N.J. at 358-59, App. A to Pet. at 4a. The tenant member's "manner was threatening to the Rivkins," and he berated their attorney, introduced evidence that was outside the record, and "in essence, offered himself as a witness concerning certain items." *Id.* at 359, App. A to Pet. at 4a-5a. The Rivkins' pleas to the Rent Board that this partisan member be disqualified from judging their case fell on deaf ears.

After the Rent Board voted to allow a rent increase to offset only $20,641.42 of the expenses, the Rivkins challenged the Rent Board's decision by filing a lawsuit in the New Jersey trial court. The lawsuit contained both a cause of action under New Jersey law to review local agency decisions--called an action in lieu of prerogative writs--and

a federal law cause of action under 42 U.S.C. § 1983, alleging violations of the constitutional guarantees of due process and equal protection.[2] The trial court found that "Baltarzuk's misconduct and manifest bias had tainted the proceedings," *Rivkin*, 143 N.J. at 360, App. A to Pet. at 6a, and the matter was remanded back to the Rent Board for a rehearing without the biased member. This time, the Rent Board approved a rent increase of $45,731.09, more than doubling its previous determination of major capital improvements and giving the Rivkins more than 75% of their request.

The Rivkins then returned to trial court, which found that the Rent Board had violated the Rivkins' due process rights, supporting an award of $6,303.34 in compensatory damages and $39,679.55 in attorneys' fees under 42 U.S.C. § 1983 and § 1988. App. C to Pet. at 54a. The trial court found that the biased member's "actions permeated the board, that the board allowed his actions and comments to affect their judgment in the case and therefore the board was recalcitrant with respect to this matter." App. D to Pet. at 58a. The trial court concluded that the bias of the tenant member "permeated the whole decision of the board," which should not have allowed him to participate in the proceedings. *Id.*

The Rent Board appealed this decision to the Superior Court of New Jersey for the Appellate Division, which reversed the judgment on the ground that the biased Rent Board member's actions were "random and unauthorized" and that the state law "action in lieu of prerogative writs" was an adequate post-deprivation remedy providing all the process the Rivkins were due. App. B to Pet. at 51a.

The New Jersey Supreme Court granted the Rivkins' petition for certification and affirmed the appellate court in

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[2] This brief addresses only the due process issues presented in this case.

an opinion issued February 29, 1996. The New Jersey Supreme Court considered the alleged due process violations under separate substantive and procedural due process analyses. Under the former, the court rejected the "arbitrary and irrational" standard for violations used by several Circuits in favor of the "shocks the conscience" standard. The court prejudged the case, stating prior to its analysis that, "we believe that the denial of a property right in the context of municipal governance rarely will rise to the level of a substantive due process violation," *Rivkin*, 143 N.J. at 366, App. A to Pet. at 13a.

Taking out of context this Court's standards for evaluating alleged infringements on liberty by law enforcement personnel enforcing criminal laws, and inappropriately focusing just on the conduct of the biased member, the New Jersey Supreme Court found no substantive due process violation. *Id.* at 366, App. A to Pet. at 14a. It rationalized that the biased Rent Board member "appears to have mistakenly believed that it was his duty to serve as a tenants' advocate. From this mistaken premise, Baltarzuk's actions were rational." *Id.* at 370, App. A to Pet. at 19a. The court closed its substantive due process analysis by baldly announcing:

> Until [United States Supreme Court] clarification, ... we seriously doubt that the Supreme Court will find a substantive due process violation to exist when a governmental body denies a property right by conduct that is "arbitrary or irrational" under state law but neither shocking to the conscience of a court in a sense of being a departure from civilized norms of governance, nor offensive to human dignity.

Rivkin, 143 N.J. at 371, App. A to Pet. at 20a.

Turning to the issue of procedural due process, New Jersey's highest court held that a fair predeprivation hearing was not required, since the biased member's actions were random and unpredictable, and thus the availability of the post-deprivation remedy successfully used by the Rivkins to reverse the Rent Board's decision provided all the due process they deserved. This incredible conclusion was reached even though it was an actual hearing which deprived the Rivkins of their property rights, at which these "unanticipated" actions were trumpeted before the entire Rent Board--who condoned the bias by refusing to disqualify Baltarzuk. The court denied the significance of the actions of the entire Rent Board, and even downplayed the impact of the biased member's advocacy role: "Perhaps Baltarzuk's disqualification should have come at an earlier stage." 143 N.J. at 384, App. A to Pet at 36a. *Perhaps* a biased judge should not have participated in the deliberations and determination of the Rivkins' property rights?

The Rivkins were injured twice. First, the Rent Board improperly denied the bulk of their rent increase request, following the lead of an admittedly biased and self-interested board member. Then, the New Jersey Supreme Court told them that property deprivations do not sufficiently trouble (or shock) its collective conscience so as to implicate due process, and that a hearing that deprived the Rivkins of property is a random, unanticipated act that does not violate due process standards as long as some postdeprivation remedy is available. The Rivkins responded by filing a petition for writ of certiorari, which amicus curiae supports with the present brief.

SUMMARY OF ARGUMENT

The "shocks the conscience" standard, adopted by the New Jersey Supreme Court for evaluating claims of property

deprivation without due process, should never have been lifted from its context of evaluating acts of force or physical restraint by government officials empowered to use such methods. The use of this standard creates a conflict with several Circuit Courts of Appeals which evaluate property regulations to insure that they are not arbitrary, capricious, or irrational. Under the latter standard, a procedural requirement that administrative boards provide a legitimate, articulated reason for their decisions to restrict property rights would facilitate court review. In the absence of such a requirement, the procedural rights to a hearing at which an applicant has the opportunity to be heard and to submit evidence are rather hollow rights.

When a government agency deprives citizens of property rights through a public hearing, this action cannot be excused due to the availability of postdeprivation remedies. This Court's *Parratt* doctrine was designed for circumstances in which a predeprivation hearing is impracticable, and has no application in circumstances when such a hearing has in fact taken place. The participation of a biased, partisan decision maker in such a proceeding violates due process and can be remedied through a civil rights suit under 42 U.S.C. § 1983.

ARGUMENT

I

THIS COURT SHOULD RESOLVE THE CONFLICTS OVER WHETHER THE DUE PROCESS CLAUSE PROTECTS PROPERTY OWNERS FROM ARBITRARY AND CAPRICIOUS GOVERNMENT RESTRICTIONS OF THEIR PROPERTY RIGHTS

The New Jersey Supreme Court has announced that deliberate, arbitrary decisions by government bodies to restrict property rights do not violate the due process guarantee of the Fourteenth Amendment. That Court bases this decision on *Rochin v. People of California*, 342 U.S. 165, 172-74 (1952). *See Rivkin*, 143 N.J. at 371, App. A to Pet. at 20a. New Jersey acknowledges that at least four Circuit Courts of Appeals have adopted a conflicting standard, *id.* at 368-69, App. A to Pet. at 17a-18a, but announces it will follow a "shocks the conscience" test until this Court says otherwise. Given the fundamental importance of the rights at stake, the Petition for Writ of Certiorari should be granted to settle these conflicts.

A. The "Shocks the Conscience" Test for Due Process Violations, Originating with the Rochin Opinion, Was Designed for the Context of Liberty Infringements in the Course of Crime Detection and Punishment and Is Inappropriate for Property Rights Violations

In the opinion below, the New Jersey Supreme Court joins the First Circuit Court of Appeals in importing the "shocks the conscience" standard into the due process analysis of property deprivations. *Rivkin*, 143 N.J. at 371, App. A to Pet. at 20a. New Jersey has gone even farther than the First Circuit, which at least recognized an alternative test: "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." *PFZ*

Properties, Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991) (internal quotation marks and citation omitted), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).

The New Jersey court adopted a test that does not fit comfortably in the property rights context. In *Rochin*, this Court grappled with the question of whether certain actions by the police to obtain evidence of a crime concealed by a criminal suspect would violate due process. The police tried forcibly to remove the drug crime evidence from the suspect's mouth when he was swallowing it, and then took the suspect to the hospital so that his stomach would be pumped with liquid to induce vomiting and thereby disgorge the contraband. *Rochin*, 342 U.S. at 166.

The *Rochin* Court recognized that "the administration of criminal justice is predominately committed to the care of the States," *id.* at 168, and that there exists "the comprehensive right of States to fashion their own rules of evidence for criminal trials," *id.* at 173. Given this context, and the obvious fact that law enforcement entails the use of force by government employees in a necessarily improvisational manner, the Court was careful to circumscribe any vehicle, such as due process challenges, that interfered with this basic and inherently dangerous responsibility of the states.

The *Rochin* Court's solution was to hold that action by police on the streets restricting liberty would violate due process if it could be said that it was "conduct that shocks the conscience," as opposed to actions that merely "offend some fastidious squeamishness or private sentimentalism about fighting crime too energetically." *Rochin*, 342 U.S. at 172. The word "shocks" is employed because of the context: the messy business of crime-fighting. In *Rochin*, the Court found that the police officers used "methods too close to the rack and the screw to permit of constitutional differentiation," *id.*, a quote which the New Jersey Supreme

Court severs from its context and submits as the definition of "substantive due process violations" in general. *Rivkin*, 143 N.J. at 366, App. A to Pet. at 14a.

The "shocks the conscience" standard is at once elastic (depending upon the subjective feeling of judges) and exacting (in setting a high threshhold) and should be confined to the context of alleged liberty infringements by government employees whose position requires the use of some physical force or restraint. *See, e.g., Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir. 1991) (alleged rude and threatening conduct by police officers); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (corporal punishment by teacher); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (alleged violent actions by prison guard). When employed in the context of an alleged deprivation of property, the very language of this test becomes almost laughable. *See LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1111 (6th Cir. 1995) (denial of apartment owners' right to receive federal low-income housing subsidies does "not even approach the level of 'shocks the conscience'").

The "shocks the conscience" test is simply inappropriate when the acts to be evaluated are not acts of physical force or coercion. Judges *should* be troubled when government bodies act to interfere intentionally with the right of an individual to enjoy the use of his property. But visceral discomfort with the result of a government decision to limit property rights should not be the basis for due process determinations when a more objective standard is at hand.

B. Government Decisions That Restrict Property Rights Should be Scrutinized to Determine if the Actions Are Arbitrary, Capricious, or Irrational

Several circuits take an approach to due process protections of property rights that, upon reflection, is far less subjective than a test based on whether a panel of judges'

consciences are sufficiently shocked. These courts look to see if a government body's decision to restrict property rights was arbitrary, capricious, or irrational. *See, e.g., DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601-02 (3rd Cir. 1995); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991), *cert. granted, judgment vacated, and remanded*, ___ U.S. ___, 113 S. Ct. 31 (1992), *reversed on other grounds*, 987 F.2d 662 (9th Cir. 1993); *Marks v. City of Chesapeake, Virginia*, 883 F.2d 308, 309 (4th Cir. 1989); *Brady v. Town of Colchester*, 863 F.2d 205, 215-16 (2d Cir. 1988).

Arbitrary, capricious, or irrational decisions either lack a legitimate justification, have an illegitimate purpose, or cannot even be explained after the fact. It has long been considered the duty of our courts to scrutinize a decision-making process that restricts property rights to see if a legitimate purpose has been served. Due process embraces the fundamental concept that certain government decisions must relate to a legitimate end of government and may not be made for no reason or for a bad reason. *See Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). This concept is the essential difference between the rule of law and arbitrary government, between a government of laws and one of men.

When a government agency conducts public hearings on an application and then makes a deliberate decision concerning property owners' use of their property, it is not too much to ask that the government supply a reason for its actions. If no reason is given, then that action is arbitrary. If the apparent reasons are impermissible, then that action is capricious. If the reason is nonsensical, then that action is irrational. If courts were to employ this approach, then due process review would be more objective and comprehensible.

The New Jersey Supreme Court in this case rejected the "arbitrary and irrational" test, because:

> In the land use context, the phrases "arbitrary and irrational" or "capricious" are often shorthand expressions for a standard of review that asks whether there are sufficient facts in the record to support the agency's action or whether the agency has followed its legislative mandate.

Rivkin, 143 N.J. at 369, App. A to Pet. at 18a (citation omitted). To the court below, a government agency does not violate due process when its actions are insupportable or ultra vires.

The New Jersey Supreme Court even appears to reject the rational basis test for property deprivations. It cited to opinions of the Eighth Circuit, which makes a distinction between the merely irrational and the "truly irrational"--the latter being the sort of decision to restrict property rights that could possibly violate due process. *Id.* at 370, App. A to Pet. at 19a; *see Chesterfield Development Corporation v. City of Chesterfield*, 963 F.2d 1102, 1104-05 (8th Cir. 1992). The Eighth Circuit is not alone in requiring something more than the irrational for a property restriction to violate the Constitution. *See, e.g., Hartland Sportsman's Club, Inc. v. Town of Delafield*, 35 F.3d 1198, 1202 (7th Cir. 1994); *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990).

The foregoing shows that even under an arbitrary and irrational test, there still remain questions as to how "irrational" conduct is to be defined for due process purposes. In the opinion below, the Court concluded that the actions of the biased individual "were rational" under his mistaken belief that his role was to abuse mobile home park owners. *Rivkin*, 143 N.J. at 370, App. A to Pet. at 19a. Other courts agree that it is rational for decision makers to carry water for their constituents. *See, e.g., Stubblefield*

Construction Co. v. City of San Bernardino, 32 Cal. App. 4th 687, 696 (1995); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988). Still others find such motivations impermissible. *Marks*, 883 F.2d at 309; *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988).

This Court should settle these conflicts and decide if due process requires that governments not act arbitrarily or maliciously when deciding to curtail the property rights of their citizens.

II

THIS COURT SHOULD CLARIFY WHETHER DUE PROCESS REQUIRES ADMINISTRATIVE DETERMINATIONS THAT RESTRICT PROPERTY RIGHTS TO BE BASED ON LEGITIMATE, ARTICULATED JUSTIFICATIONS

The *Rivkin* case presents this Court with the opportunity to address a most fundamental question concerning the meaning of the Due Process Clause for property owners navigating through the administrative process. As the foregoing demonstrates, circuits are at odds over whether arbitrary, capricious, or irrational regulation of property violates due process. But even if this Court settles the question by rejecting the "shocks the conscience" standard, a big question still remains: How will courts determine if a government decision is arbitrary, capricious or irrational? Will they look to the actual grounds for the decision, *see Brady*, 863 F.2d 215-16 (trier of fact to decide if permit decision was based on impermissible grounds) or instead supply their own rational basis by hypothesis, *see Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir. 1986) (holding "a zoning decision can be justified by hypothesized

purposes" but acknowledging that for "protected property interests" a "later procedural due process inquiry might require a zoning board to point to *a* rational basis").

As the New Jersey Supreme Court recognized, "[a]nalytically the Rivkins' case is much closer to a procedural due process claim," than a substantive due process claim. *Rivkin*, 143 N.J. at 371, App. A to Pet. at 20a. The reason that an arbitrary decision was reached by the Rent Board was that one of its members chose not to consider the evidence in a neutral manner but instead personally chose to be the "adversary" in an adversarial process. This Court should consider whether administrative determinations affecting property rights require a certain result that is *procedural* in nature--namely, an articulated, legitimate justification for the determination. This final step in the process facilitates review by the courts but does not entail the substitution of a court's judgment concerning policy matters for the judgment of a regulatory body. This final step is consistent with the traditional approach taken by this Court to the constitutional protection of property rights.

This Court has long recognized that a special, particular process is "due" when property rights are at stake. In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 241 (1897), it was held that due process requires that property taken by the government for public purposes be acquired by payment of just compensation. The Court explained, "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." 166 U.S. at 236-37. Similarly, if government regulation effects a taking of property, the government must pay just compensation for the time period in which the property owner was subject to the unconstitutional action--"temporary takings" compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 322 (1987).

The importance of the substantive outcome in cases involving property rights is not derived from the policy choices of judges, but from the choice made by the people of this nation in including protection of property rights in the Bill of Rights. "[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (citation omitted).[3]

Unlike the wide ranging and often controversial interests asserted in the context of alleged liberty deprivations, property rights are matters of settled common law and are most frequently restricted in the course of quasi-judicial, administrative processes. As this Court noted in *Daniels v. Williams*, "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." 474 U.S. 327, 331 (1986) (citation omitted; emphasis in original). The Due Process Clause "'"was intended to secure the individual from the arbitrary exercise of the powers of government."'" *Id.* (citation omitted). If government conducts a hearing in

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[3] Property rights receive heightened protection under the Takings Clause, as the regulation of the use and enjoyment of property must have more than a mere hypothetical connection with a legitimate end of government--it must *in actuality* "substantially advance" such an end. *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304, 316 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.3 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). However, that clause is no substitute for the Due Process Clause, under which payment of actual damages for government mistreatment can be obtained. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d at 464.

a deliberate manner that results in a restriction of property rights, then due process should require that the reasons behind the property rights restrictions be publicly articulated by the government body.

This procedural requirement serves two purposes. If a government body must verbalize its reasoning, "substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes*, 407 U.S. at 81 (discussing importance of notice and opportunity to be heard). Second, an official statement by the regulatory body will enable courts to determine if the grounds justifying a decision are within the jurisdiction of the government agency, or are instead an ultra vires action. When property regulators act through the administrative process to determine the property rights of individuals, it is not much of an imposition to require that "the decision maker should state the reasons for his determination and indicate the evidence he relied on." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (discussing state termination of welfare benefits).

In this particular case, if the Rent Board had been required to state the reasons for its decision and that statement revealed that the evidence and arguments proffered by Baltarzuk were the basis for the diminished rent increase, the violation of due process would be clear and obvious and would require no amount of hypothesizing by the courts. Given the fundamental importance of private property rights and the need to provide an anchor for judicial review of administrative decisions affecting these rights, this Court should grant the petition for writ of certiorari in order to establish that a statement of reasons is necessary as a bright line procedural requirement.

III

THIS COURT SHOULD DETERMINE WHETHER A PROCEDURALLY INADEQUATE HEARING IN WHICH A BIASED MEMBER PARTICIPATES VIOLATES DUE PROCESS OR IS INSTEAD SUBJECT TO THE PARRATT DOCTRINE

The New Jersey Supreme Court held that the Rent Board's decision to wrongfully deny the Rivkins' rent increase application, reached with the full participation of a biased member whose actions "permeated the whole decision," App. D to Pet. at 58a, was not a violation of the Rivkins' right to procedural due process. The court purported to be applying the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that a predeprivation hearing with all the trappings of due process is not required for property deprivations accomplished by "a random and unauthorized act by a state employee," since "[i]n such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur." *Id.* at 541. The New Jersey court has misapplied the *Parratt* doctrine in a manner which disserves the reasoning behind the doctrine.

A. Deliberate Decisions by a Government Body in the Course of a Public Hearing Are Not Random, Unauthorized Acts

The *Parratt* Court considered whether the negligent loss of a prisoner's mail-order hobby kit by prison mail room employees was a deprivation of the prisoner's property without due process of law.[4] Essentially, the issue was whether a state government had the duty to conduct a hearing, with

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[4] In *Daniels v. Williams*, 474 U.S. at 334-36, this Court overruled *Parratt* on the issue of whether negligent government acts could violate due process, finding in the negative.

notice and the opportunity to be heard, for a prisoner prior to misplacing his mail. Quite obviously, a hearing is impossible under such circumstances, as the act of negligence was "in almost all cases beyond the control of the State." *Parratt*, 451 U.S. at 541.

Three years later, this Court extended the *Parratt* doctrine to certain *intentional* deprivations, as "[t]he state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Significantly, this Court added: "Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent." *Id.*

The property deprivation in the *Rivkin* case was accomplished not by some maverick government official acting on his own without knowledge of his agency, but was committed by an entire administrative board during the course of four public hearings. The biased member of the Rent Board, who acted as an advocate against the interests of the applicant (and for his own interests, as a resident of the subject mobile home park), did not attempt to hide from the rest of the Rent Board his antagonistic position: "He stated on the record that it was his function to 'serve the people of the mobile home park.'" *Rivkin*, 143 N.J. at 358-59, App. A to Pet. at 4a.

The deprivation of property in these circumstances was not the result of a random act of a government employee occurring beyond the supervision of his department superiors, but was instead the result of an official action of the very agency in question. Had Baltarzuk taken the only copies of the Rivkins' application for a rent increase and destroyed them without knowledge of the rest of the Rent Board, then the *Parratt* doctrine would come into play and

the availability of postdeprivation remedies would be sufficient process. But when an entire Rent Board, acting in its official capacity and through a series of public hearings and deliberations, deprives citizens of property the mere availability of postdeprivation remedies is not enough.

The Rent Board was not faced with an unpredictable occurrence--the deprivation was in the course of hearings designed to determine whether or not a rent increase will be allowed. It certainly knew that the deprivation was taking place. It certainly knew that a biased member was poisoning the process, as he admitted his wrongful view of his role on the record at these hearings. If official hearings to consider a rent increase application is not an official government procedure, then it is hard to imagine what would qualify as one.

The point of the *Parratt* doctrine is that the government cannot be expected to convene a hearing prior to every isolated act of its employees that deprives citizens of their property. But if a hearing is practicable and the government agency does have one, that hearing must comport with due process.

B. Failure to Disqualify a Biased Member from an Administrative Decision Taints the Proceedings and Deprives Applicants of Their Right to Due Process

The *Rivkin* court held that the process provided the Rivkins by the Rent Board was not inadequate merely because an openly-biased member "behav[ed] as a tenant advocate and introduc[ed] evidence from outside the record," while participating in a decision to deny the Rivkins the bulk of the rent increase to which they were entitled. *Rivkin*, 143 N.J. at 377, App. A to Pet. at 28a. The Court achieved this result by its finding that Baltarzuk's actions were not *required* by the terms of the local rent control ordinance, and thus cannot be said to have resulted from the state procedures.

But the critical issue below was not whether due process is violated by having a Rent Board member come from the ranks of mobile home park tenants. The issue was whether the Rivkins were entitled to have their rent increase application considered by neutral, disinterested government officials. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and *have its merits fairly judged.*" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (emphasis added). *See also Goldberg*, 397 U.S. at 271 ("of course, an impartial decision maker is essential").

This Court should grant the Petition for Writ of Certiorari to determine whether administrative boards can include biased, partisan, and self-interested members in the decision to restrict the property rights of applicants. The New Jersey Supreme Court took as given the established facts that Baltarzuk was biased against the Rivkins, introduced evidence from outside the record, and had such an impact on the board that his actions "permeated the whole decision." Does this amount to due process, or is it an affirmative injury to the Rivkins' constitutionally protected interests by their government?

CONCLUSION

An administrative board, after four public hearings, decided to deny the bulk of a rent increase application submitted by petitioners. This decision was reversed by a trial court, which found that the participation of a biased

member of the board--who introduced evidence from outside the record, argued with and berated petitioners' attorney, and proclaimed his role to be one of advocate rather than adjudicator--was determinative of the outcome, in violation of petitioners' due process rights. The trial court subsequently awarded damages and attorneys' fees under 42 U.S.C. §§ 1983, 1988.

After an appellate court threw out this award, the New Jersey Supreme Court affirmed the appellate decision. That court based its decision on the view that property rights violations cannot "shock the conscience" and that the actions of the board were random, unauthorized, and unpredictable. This decision employs the *Rochin* standard improperly and rejects the "arbitrary and capricious" standard for due process claims used by several federal appellate courts. Further, it inappropriately employed the Parratt doctrine--which excuses the absence of predeprivation hearings when such a hearing is impracticable--in a case in which there *actually was a predeprivation hearing*.

In order to settle the conflicts created by the *Rivkin* opinion and bring some clarity to an increasingly muddled area of the law, amicus respectfully requests that this Court grant the petition for writ of certiorari.

DATED: July, 1996.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 11 1996
CLERK

No. 95-1980 (4)

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Petitioners,

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICI CURIAE OF MANUFACTURED HOUSING INSTITUTE AND NEW JERSEY MANUFACTURED HOUSING ASSOCIATION IN SUPPORT OF PETITION

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Manufactured Housing Institute (MHI) and New Jersey Manufactured Housing Association (NJMHA) submit this brief, with consent of the respondent and the petitioner, as amici curiae in support of the petition for a writ of certiorari to the Supreme Court of New Jersey.

STATEMENT OF INTEREST

At issue in this case are the proper limits of municipal behavior and the Court's role in establishing and maintaining those limits. The abuse of power by governmental officials, particularly, as is the case here, where an entire municipal body authorized the abuse, is an issue of great public importance. This case arises from an activity that occurs thousands of times each year throughout the country, that is, a decision by a rent leveling board. However, in this case, one board member adopted a hostile and plainly biased attitude towards petitioners and further introduced facts from outside the record. During the hearings, petitioners made several applications to the Board to remove this board member from the proceedings. These applications were repeatedly denied. Condoning a board member's berating of an applicant and the board's reliance on that member's unsubstantiated allegations violate the canons of decency and fairness that our system regards as fundamental. The ramifications of this decision on manufactured housing throughout the nation amount to a denial of fundamental rights. Thus, the decision has far reaching impact on manufactured housing, an important affordable housing source in New Jersey and throughout the country. This case will also have an impact on the behavior of municipal boards beyond the rent control context. As such, this case presents special circumstances that must be settled by this Court.

MHI is a non-profit Illinois trade association headquartered in Arlington, Virginia, which represents all aspects of the

manufactured housing industry: community owners, manufacturers, suppliers, retailers, lenders, state manufactured housing associations, and private third party inspection agencies. MHI represents 48 affiliated state associations and its membership produces approximately seventy percent of the total production of the industry. NJMHA is a state association member of MHI and the petitioners are members of NJMHA. Petitioner David Rivkin is both a member of NJMHA and a certified representative member of MHI. MHI is submitting this brief because of its concern that the New Jersey Supreme Court decision will result in unchecked abuses of municipal power, which will adversely affect the manufactured housing industry.

NJMHA is a non-profit trade organization comprised of in excess of 200 members. The NJMHA members include manufactured housing community owners, operators, suppliers, consultants and other individuals who are involved in the various facets of the manufactured housing industry in New Jersey. Of the over 200 members, approximately 165 are owners or operators of manufactured housing communities in New Jersey. Currently, there are approximately 250 manufactured housing communities in New Jersey.

Based on available information, a large number of mobilehome park communities are subject to rent control. The operations of manufactured housing communities throughout the country play a unique role in meeting housing needs and provide an opportunity for many citizens who would otherwise be unable to afford home ownership. Manufactured housing provides the least cost nonsubsidized housing alternative in the country. NJMHA and MHI and their individual members are directly affected by the outcome of this case and, in particular, the social and economic consequences of the decision.

This case provides the Court with a chance to define the

parameters of acceptable behavior on the part of public officials. The Court is provided with an opportunity to issue a mandate that the abuse of power by municipal representatives is unacceptable and that individuals who are subject to such abuse will not be deprived of their constitutional rights and left without an adequate remedy. There are several factors that make this case so critical. First, the behavior of the individual board member and the acceptance of that behavior by the entire board must be addressed and curtailed. When the record is reviewed, it becomes clear that it is of vital importance for the Court to address the constitutional implications of this deliberately biased municipal action. Second, the position taken by the New Jersey Supreme Court is inconsistent with other jurisdictions. Third, constitutional protections must apply when local officials act with total contempt for an applicant's basic rights and the notions of fundamental fairness. The standard for that constitutional protection is a standard that must be clearly defined and articulated. Fourth, the sanctioning of the conduct by the board and the board's failure to disqualify the member leave applicants at risk that this type of incident will be repeated and that the applicant will be dependent on the individual member's decision-making abilities. The scope of the impact of this decision cannot be underestimated.

SUMMARY OF THE ARGUMENT

Rule 10(b) provides that certiorari will be granted where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or the United States Court of Appeals. Those criteria are clearly met in this case. A writ of certiorari pursuant to Rule 10(b) is therefore appropriate.

Uncertainty as to the availability of 1983 remedies affects property rights on all levels. The record in this case does not

support a finding that a mere procedural error occurred. It has been established that there are substantive, as well as procedural due process violations at issue. These substantive due process violations need to be addressed. An action in lieu of prerogative writs does not provide an adequate postdeprivation remedy where there has been a denial of substantive due process rights.

This case presents an opportunity for the Court to establish guidelines under which responsible decision-making must take place. A municipality must be held to an established standard of conduct. In this case, not only did the individual board member openly acknowledge that he was acting outside his role, but also, the board as a whole was aware of the improper behavior and allowed it to continue. The inappropriate conduct was authorized. Substantive due process violations in this context have far reaching social implications. Thus, a reversal of the New Jersey Supreme Court's decision will address this type of violation.

This Court's recognition of the existence of egregious behavior in this matter will not result in an abuse of the system or an unwillingness of people to serve as volunteers on the municipal level or the assertion of inappropriate civil rights litigation. Instead, review by this Court will satisfy the constitutional guarantees and uphold this Court's ongoing role to provide guidelines on the parameters of acceptable state action.

The State must be held accountable for its actions that cause a deprivation of due process rights. The New Jersey Supreme Court recognized the vital importance of this concept when it agreed to review whether or not an applicant appearing before a local rent leveling board may claim an unconstitutional deprivation of property and thus, collect damages when a member of a local board acts in a biased manner and that behavior

is accepted by the board. Following review, the New Jersey Supreme Court established a standard of "egregious misconduct that shocks the conscience, violates civilized norms of governance, or constitutes invidious discrimination on the part of a board member or board." This standard does not allow for redress by an applicant against the inappropriate actions of a board member except in very rare circumstances and should be overturned.

Further, the New Jersey Supreme Court inappropriately applied the *Parrat* analysis to this case: (1) *Parrat v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 680 L. Ed. 2d 420 (1981) does not apply to cases where the aggrieved parties have established substantive as well as procedural due process violations by governmental officials; (2) the *Parrat* analysis does not apply to the conduct of a rent leveling board that was not "random and unauthorized," but was readily foreseeable and could have been remedied; and (3) where aggrieved parties do not have adequate postdeprivation remedies, the State should be held accountable for its actions that cause deprivation of due process rights. For these reasons, the decision of the New Jersey Supreme Court in this case must be reversed.

ARGUMENT

I.

THE STATE MUST BE HELD ACCOUNTABLE FOR ITS ACTIONS THAT CAUSE A DEPRIVATION OF DUE PROCESS RIGHTS.

In its February 29, 1996 decision in this case, the New Jersey Supreme Court explained that the Due Process Clause is the source of three different kinds of constitutional protection:

> First, it incorporates specific protections defined in the bill of rights . . . Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process" [under which the state may not] take property without providing appropriate procedural safeguards.

Daniels v. Williams, 474 U.S. 327, 337, 106 S. Ct. 662, 677-678, 88 L. Ed. 2d 662, 672 (1986) (Stevens, J. concurring, citations and footnotes omitted).

The New Jersey Supreme Court found that the substantive due process doctrine "does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir.) (quotation and citations omitted), *cert.*

granted, 502 U.S. 956, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991), and *cert. dismissed* 503 U.S. 257, 112 S.Ct. 1151, 117 L. Ed. 2d 400 (1992). Rather, "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . traditional notions of fairness . . . [and that are] offensive to human dignity.' " *Rivkin v. Dover Township Rent Leveling Board* (*Rivkin*) at page 15; *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989). The New Jersey Supreme Court also explained that the "conduct of an errant board member who berated an applicant and brought in facts outside the record at a rent proceeding in violation of acceptable board practice does not rise to the level of a substantive due process violation under the Supreme Court's standards." (*Rivkin* at page 15); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990); *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2d Cir. 1988); *Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir.) (determining that substantive due process rights may be violated when a municipal council arbitrarily and irrationally interferes with building permit process), *cert. denied*, 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d 107 and *cert. denied*, 488 U.S. 868, 109 S. Ct. 176, 102 L. Ed. 2d 145 (1988); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) ("Arbitrariness, abuse of discretion, caprice or unfairness giv[e] rise to a constitutional claim [of denial of substantive due process in state permit processing actions]").

The state action that forms the basis for petitioners' contentions in this case was not only arbitrary, capricious and unreasonable, but openly and fervently biased against the applicant. Any attempt to minimize the actions of the board and the constitutional deprivation at issue in the case subverts the very purpose of the protections provided by the Constitution. No party has asserted that the Court should encourage inappropriate claims against municipal officials or municipal bodies. No party has asserted that inappropriate civil rights litigation should be

condoned. However, municipal behavior that is openly and fervently biased must be curtailed.

There is no disagreement that the Constitution provides a right to an adequate remedy. However, an action in lieu of prerogative writ is not an adequate remedy when substantive due process rights have been violated. Issues relating to the parameters of acceptable behavior by public officials and the abuse of power by government officials are issues of great public importance. Where aggrieved parties do not have adequate postdeprivation remedies, the State should be held accountable for its actions that caused the deprivation of due process rights. This is a case of substantive as well as procedural due process violations.

The New Jersey Supreme Court agreed to review whether or not an applicant appearing before a local rent leveling board may claim an unconstitutional deprivation of property and thus, collect damages when a member of the local board acts in a biased manner and is not disqualified. Following that review, the New Jersey Supreme Court established a standard of "egregious misconduct" that shocks the conscience, violates civilized norms of governance, or constitutes invidious discrimination on the part of a board member or board. This standard is overly restrictive and contrary to a more expansive interpretation given the Due Process Clause by many current court decisions.

This conflict was noted by the New Jersey Supreme Court in its decision. Further, the importance of this case and the need for the Court's supervision is set forth in the conflicting interpretations expressed in other court opinions.

In federal court, in order to maintain an action for a substantive due process violation, the plaintiff must prove that the regulation or decision was "arbitrary or irrational." *See, e.g.*,

DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592, 593 (3rd Cir.), *cert. denied*, __ U.S. __, 116 S. Ct. 352, 133 L. Ed. 2d 247 (1995). In state court, however, the plaintiff must prove that such a decision was "arbitrary, capricious and unreasonable." However, the New Jersey Supreme Court confused the arbitrary and capricious standard for overturning board decisions with the analysis utilized by federal courts. The New Jersey Supreme Court inappropriately viewed the arbitrary and capricious standard as merely a term of art relating to a failure of a local agency to follow a necessary standard in its decision making, instead of the analysis used by the federal courts involving that "egregious governmental abuse against liberty or property [that] deprives one of its substantive due process rights."

In this decision, the New Jersey Supreme Court rejects the "arbitrary and irrational" standard utilized by many Federal Court opinions to find substantive due process violations. *See, e.g., DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592. At the same time, New Jersey confused the federal "arbitrary and irrational" standard with New Jersey's standard in agency review cases, which requires analysis in terms of arbitrary, capricious and unreasonable behavior. That standard requires challenges to agency action to demonstrate that the action was not based on "substantial evidence" in the record made before that agency. In this case, the court inappropriately applied the more stringent standard under the misunderstanding that substantive due process protection should be reserved for only "truly irrational" government abuses. Instead, the New Jersey Supreme Court should have equated "truly irrational" governmental abuse with that conduct that bears no relationship to the merits of the pending matter.

The standard imposed by the New Jersey Supreme Court does not allow for redress by an applicant against the inappropriate actions of a board member and must be overturned.

II.

PARRAT IS INAPPLICABLE TO CASES WHERE THERE ARE SUBSTANTIVE AS WELL AS PROCEDURAL DUE PROCESS VIOLATIONS AND *PARRAT* WAS APPLIED INCORRECTLY TO THIS CASE.

A. *Parrat* is inapplicable to cases such as petitioners' where the aggrieved parties have established substantive as well as procedural due process violations by governmental officials.

The New Jersey Supreme Court erred in its application of *Parrat, supra,* to the case at bar. *Parrat* is inapplicable to cases such as petitioners' where there are contentions of substantive as well as procedural due process violations. Petitioners assert that both their procedural and substantive due process rights have been violated. Thus, both the substantive due process violations and the procedural due process violations must be addressed.

The New Jersey Supreme Court's inaccurate identification of the nature of the constitutional violations at issue led to its erroneous affirmation of the Appellate Division. The New Jersey Supreme Court's decision ultimately relied upon *Parrat, supra,* in its application to the facts of this case. In *Parrat,* the Court found that a prisoner did not have a cause of action under 42 U.S.C. § 1983 based on his allegations that prison officials had negligently misplaced a $23.50 hobby kit the prisoner ordered by mail since the officials did not provide a hearing prior to the deprivation. No assertion was made in *Parrat* that the procedure was infirm. The Court analyzed the claim in terms of the prerequisites for a successful Section 1983 claim but only dealt with issues regarding the absence of a predeprivation hearing in terms of procedural due process. Ultimately, *Parrat* concluded that a postdeprivation hearing may be constitutionally sufficient in cases where (1) prompt state action is a necessity, *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S. Ct.

101 (1908) (in which contaminated food was seized to protect the public health); *Fahey v. Mallonee*, 332 U.S. 245, 67 S. Ct. 1552 (1947) (in which bank operations were seized because of allegations of bank mismanagement); or (2) a predeprivation hearing is impractical such as in the case of negligence by public employees; and (3) when an "adequate" postdeprivation procedure is provided. *Parrat, supra* at 430-431.

In *Parrat*, the Court explained that it was impossible to predict that a prison employee would negligently destroy a hobby kit; further there was a state tort claim procedure available for the prisoner to recover the value of his lost property. *Parrat, supra* at 432-433. The Third Circuit has since approved the view that *Parrat* cannot be read to make a section 1983 action resembling a tort suit disappear into thin air. *Berlanti v. Bodman*, 780 F.2d 296, 302 (3rd Cir. 1985) citing *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984). The *Parrat* case applies only when the plaintiff alleges a deprivation of procedural due process. The *Parrat* analysis is inapposite when the petitioner has alleged violations of substantive constitutional prescriptions.

Further, *Parrat* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safeguards is impracticable or infeasible. *Augustine* at 329; *Berlanti* at 302. That is not the case here. The hearing that took place before the board provided evidence of the deprivation before a decision was issued.

Petitioners, and other similarly situated members of manufactured housing communities nationwide, ". . . may maintain a claim of substantive due process violation upon allegations that the government deliberately and arbitrarily abused its power." *Bello v. Walker*, 840 F.2d 1124, 1128-1129 (3rd Cir.), *cert. denied*, 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d 107 (1988). When the actions of a rent leveling board, a

governmental body, ". . . are motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the . . . application . . ." courts have found that a substantive due process violation has occurred. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3rd Cir. 1991).

It is clear that where the conduct of a state employee is outrageous, abusive and thoroughly "shocks the conscience," then it will rise to the level of a substantive due process violation. *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952). It is well established that substantive due process violations are founded in "canons of decency and fairness which express notions of justice . . . so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . do more than offend some fastidious squeamishness of private sentimentality . . . [T]his is conduct that shocks the conscious." *Id.* The ramifications of this decision on manufactured housing throughout the nation amount to a denial of fundamental rights.

Where a state board takes no action to halt or prevent the ongoing deprivation of due process rights, it is deemed to have knowledge of and constructively acquiesce in the constitutional deprivation. *Salerno v. O'Rourke*, 555 F. Supp. 750, 756 (D. N.J. 1983); *The Skydiving Center of Greater Washington, D.C., Inc. v. St. Mary's County Airport Commission*, 823 F. Supp. 1273 (D. Md. 1993) (wherein the court found that the county commissioner was deemed to have authorized the actions of the airport commission, a subordinate agency, when the airport commission passed a ban on skydiving without affording plaintiffs an opportunity to be heard). It is appropriate for this Court to enforce limits on acceptable governmental behavior. In cases where the state board is well aware of the deprivation in advance and as it took place, it cannot later assert that the acts were unauthorized. This is especially true where the aggrieved

parties repeatedly asked the board to correct the wrong before it was complete and the board neither disapproves the wrong nor takes action to halt its effect.

There are at least 100 manufactured housing communities in New Jersey and hundreds more nationwide that are subject to rent control. Manufactured housing provides one of the few remaining sources of affordable housing in this country. Cost control is critical in maintaining the viability of this housing source. Community owners and operators need to know that there are guidelines, which define the acceptable limits of behavior, under which municipal boards can act. Municipalities also need to be provided with a standard of conduct. This Court must establish guidelines for the appropriate standard of conduct and further provide a remedy when those guidelines are not followed.

B. The conduct of the rent leveling board was not "random and unauthorized," but was readily foreseeable and could have been remedied. Therefore, the *Parrat* analysis does not apply.

Where a state board acts in a way that is not "random and unauthorized" but is foreseeable and consistent throughout the process, it can be and should be remedied in order to guarantee those appearing before the board their rights guaranteed by the constitution. At least 100 manufactured housing communities in New Jersey and hundreds more nationwide are subject to rent control. The owners and operators of these communities have fundamental constitutional rights that must be protected.

In the *Parrat* case, the acts of the prison officials in negligently disposing of the plaintiff's hobby kit were random and unauthorized; as such, the Court explained there was no way the state could have provided predeprivation hearings since it was impossible to predict such acts and institute procedures to

accommodate them. *Parrat*, 451 U.S. at 541, 101 S. Ct. at 1916. Therefore, no action can lie where the state then provides adequate postdeprivation procedures whereby the victim has an opportunity to be heard "at a meaningful time and in a meaningful manner." *Parrat*, 451 U.S. at 540, 101 S. Ct. at 1915.

Where the actions of a board member can be anticipated by a pattern of behavior throughout deliberations, the conduct should be and can be remedied prior to a final determination of the aggrieved parties' applications. Where the remedy is available and not provided, the conduct becomes ratified as state action. As such, the deprivation of rights could not have been unpredictable. Therefore, it cannot be said that a remedy was impracticable. The controlling inquiry is whether the state was in a position to provide for predeprivation process. *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984).

Since the actions of the board member were in fact "state action" and part of the state system, the New Jersey Supreme Court should have found that the actions resulted from established state procedure, which was not random or unauthorized and should have been remedied prior to any deprivation.

Clearly, in this case, the state had full knowledge of the deprivations from the moment that the abusive board member began to speak at the first hearing. The board was in control over the following hearings. Therefore, the board was in a position prior to the ultimate determination in the case, to alleviate the deprivation and either disqualify the board member or otherwise regulate his apparent bias, which led to the deprivation of rights.

C. Where aggrieved parties such as petitioners do not have postdeprivation remedies, the State should be held accountable for its actions that caused a deprivation of due process rights.

Pursuant to the *Parrat* analysis, due process is afforded in a case of negligent deprivation of procedural due process rights only when an "adequate" postdeprivation remedy is available. Where no such remedy is available, the due process rights are violated and the state will be held accountable. Applying the decision below, the only relief available to a litigant who appeals from a board decision is to file an action in lieu of prerogative writs, which allows for the correction of governmental action but the litigant cannot obtain damages, attorneys fees or costs. *See Ballantyne House Assoc. v. Newark*, 269 N.J. Super. 322, 331 (App. Div. 1993); *O'Neill v. Washington Tp.*, 193 N.J. Super. 481, 486 (App. Div. 1984); *Ippolito v. Mayor of Hoboken*, 60 N.J. Super. 477, 488-489 (App. Div. 1960). This is an inadequate postdeprivation relief for manufactured housing communities throughout the nation.

A postdeprivation remedy will be found to be "inadequate" where "seeking redress through tort suit would probably be so lengthy and speculative process and even a successful suit would not vindicate entirely the employees' rights to be free from discriminatory treatment." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 266 (1982).

In finding that petitioners or any aggrieved party including NJMHA and MHI members in a similar situation, have adequate postdeprivation remedies available in the form of litigation, the New Jersey Supreme Court has not addressed the fact that this alleged "postdeprivation remedy" is speculative at best since on remand the case merely gets returned to the same board with the chance of bias arising yet again. Moreover, such actions may result in extreme delay and significant costs. These actions not only violate the due process rights of petitioners and other

NJMHA and MHI members, but threaten the continued existence of manufactured housing communities throughout the country. All community operators, not just those with the means to litigate are entitled to protection of their due process rights. Therefore, the Court must ensure that adequate remedies are available before sending aggrieved parties back to the whims of an uncontrolled and apparently presently uncontrollable board.

This Court must provide the limits of governmental behavior and provide a remedy with meaning when that guidance is not followed.

CONCLUSION

This case presents social and economic issues that will affect manufactured housing communities throughout the country. Defining the parameters of acceptable behavior on the part of public officials and addressing the abuse of power by government officials present issues of great public importance. A reversal of the New Jersey Supreme Court's decision is the appropriate manner in which to address these issues. The parameters of acceptable behavior on the part of public officials must be defined so that their power is not abused to deprive parties appearing before them of their constitutional rights.

Respectfully submitted,

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No. 95-1980

(5)

Supreme Court, U.S.
FILED
AUG 1 1996
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

DAVID RIVKIN, EDWARD RIVKIN, JUDITH RIVKIN, t/a GALAXY MANOR, a New Jersey Partnership,

Petitioners,

vs.

DOVER TOWNSHIP RENT LEVELING BOARD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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I

PRELIMINARY STATEMENT

In its Counterstatement of the Case, Dover Township Rent Leveling Board (hereinafter the "Board") criticizes the Rivkins' alleged omissions of procedural details of the remand which followed the trial court's initial finding that the Board had violated Petitioners' due process rights. In reply, the Rivkins point out that their statement of the case closely followed those facts recited by the New Jersey Appellate Division and the New Jersey Supreme Court in their rulings below. In the same vein, the Rivkins followed the lower courts' view that the only facts which were important to the determination of the case were that in the absence of the Board member who tainted the original proceedings, a new panel awarded Petitioners nearly two and one half times more capital improvement rent increases. This, in turn, dramatically underscored the impact the biased Board member had on the rest of the Board in the original hearings.

FURTHER REASONS FOR GRANTING THE WRIT

I.

PETITIONERS HAVE ALLEGED AND SHOWN A DENIAL OF EQUAL PROTECTION.

In Point One of its opposition, the Board asserts that the record below does not support the Rivkins' equal protection claims which are based on "purposeful discrimination" under this court's ruling in *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944). *Snowden* supported a finding of equal protection violations if the claimant could show "an element of intentional or purposeful discrimination". It further noted that such an element "may appear on the face of the action taken with respect to a particular class or person . . . . *Id.*, at 321 U.S. at 8, 64 S. Ct. at 401, 88 L. Ed. 497. Baltarzuk's declaration that he was

"here to serve the people of the mobile home parks" leaves little doubt that he purposefully discriminated against landlords in general and his constant pattern of harassment, threats and adversarial abuse leaves little doubt that he purposefully discriminated against the Rivkins in particular.

In the same point, the Board misdirects its argument against the Petition, claiming that the Rivkins' equal protection claim attacks the Dover Township Ordinance. This is simply not the case as the Rivkins contend that it was the specific acts of the Board that were "purposefully discriminatory", resulting in a violation of their equal protection rights. Since *Parrat v. Taylor,* 452 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) does not bar Section 1983 claims based on equal protection, the balance of the Board's argument concerning the equal protection claim has no bearing on the issue.

The Board incorrectly states that the New Jersey Supreme Court assumed "arguendo a substantive due process violation for the purpose of being able to address it." (RB 3). A proper reading of New Jersey's Supreme Court decision shows that it clearly held, as its key ruling, that the behavior complained of did not constitute substantive due process violations. The essence of this appeal is that New Jersey's sharp restrictions on substantive due process claims based on biased municipal agency action are incorrect as a matter of law and in direct conflict with numerous other federal court rulings.

The Board also incorrectly states that the New Jersey Supreme Court and Appellate Division viewed the Board's behavior as "crude" or "out of line with appropriate Board member behavior". However, as noted in the New Jersey Supreme Court's decision, all three New Jersey courts acknowledged that the record of the rent control hearings clearly established that Board member Baltarzuk was biased, that he

acted as an advocate for the tenants, that he had sought information outside the record, and that he had tainted the deliberations of the Board. (Appendix A, 4a-5a). This case is about much more than "crude" or generically "inappropriate" behavior. It is about conduct which is on its face biased and deliberately aimed to harm the applicant. It is about conduct which should be deemed constitutionally unacceptable.

II.

THE PETITIONER HAS STATED SUBSTANTIAL REASONS FOR GRANTING THE WRIT.

At Point Two of its opposition, the Board declares that there is no basis stated in the Petition for this Court to exercise its jurisdiction. The Rivkins' argument is labeled as merely "entreaty". However, the Rivkins have stated numerous and substantial reasons for granting the Writ. They specifically pointed out the divergence of opinion between various Circuit Courts and the clear conflict between the New Jersey decision in this case and the opinion of many federal Circuit Courts that substantive due process violations can and do occur in the context of municipal agency action which is biased, arbitrary or unreasonable. This is not mere "entreaty" but falls squarely within Rule 10(b) of the Rules of the Supreme Court of the United States which states under "Reason for Granting Petitions for Certiorari" that the court may grant the Writ when:

> (b) A state court of last resort has decided an important Federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. . . .

The New Jersey Supreme Court itself recognized that its

decision fell within the scope of Rule 10(b). *See* PB 6; Appendix A, 17a.

III.

THE BEHAVIOR OF THE BOARD AND BOARD MEMBER BALTARZUK CONSTITUTED SUBSTANTIVE DUE PROCESS VIOLATIONS.

The Board's opposition brief states "it is important to note that the trial court did not determine that what the Board did or did not due was improper" (PA81, PA85) ". . . In fact, no court has ever found that the Board itself was prejudiced. Only the one member was, at most." (RB7). The Board overlooks the following colloquy between its counsel (Mr. Babcock) and the trial court on February 16, 1993 as follows:

> Mr. Babcock: . . . [W]hat I mean by that is not only what the law indicates as I understand it, but that Your Honor's ruling in November of 1991 did not find any malfeasance, improper conduct, unconstitutional conduct as I understand it by the Dover Township Rent Leveling Board. It found it as to an individual and that individual infected the ultimate decision. Now maybe I'm pursuing an issue that Your Honor feels is already crystal clear in terms of the order entered. If that is the case, I don't know if the Court feels any need to clarify that at this juncture, but I certainly still don't understand that this court found the Rent Leveling Board to have committed unconstitutional acts.

> The Court: Well I found that because of the actions of Mr. B (Baltarzuk) in this case that his actions permeated the Board, that the Board allowed his actions and comments to affect their judgment in the case and, therefore, the Board was recalcitrant with respect to this matter as Mr. B being the, if you will, the yeast in the decision making. But they allowed and accepted his comments and incorporated it into their findings, and as I remember it he came off with a number that was nowhere, that actually had no factual basis, and that was, but what I am saying to you is that I think that in allowing him to continue descent (to sit?), and I think that Mr. Levin many times pointed out the prejudicial attitude of this gentlemen, I think that it permeated the whole decision of the Board, not just his act, but the whole decision of the Board and in allowing it to happen, and I think he should have been asked by the Chairman to step down and I think that, and I thought that I crystally clear found that *the Board was in violation of his rights,* but the active ingredient to make the Board recalcitrant with respect to his civil rights was this Mr. B. So I can't make it clearer than that.

(Emphasis added) Appendix D, 57a-58a. Furthermore, in its Order dated April 14, 1993 the court specified in its findings:

> The Dover Township Rent Leveling Board (hereinafter "the Board") violated plaintiffs' due process rights during the course of

> hearings on a rental increase application which commenced on or about June 19, 1990.

Appendix D, 54a.

In sum, the Board plainly mischaracterizes the record below with respect to the trial court's specific finding that the entire Board was affected by the biased conduct of Mr. Baltarzuk. Even if this were not the case, the Rivkins vigorously assert that the participation of a single openly biased board member is sufficient to constitute a violation of substantive due process rights especially where the Board repeatedly refuses to disqualify that Board member at numerous public meetings where he openly declares his adversarial position.

CONCLUSION

For the reasons set forth herein and for the reasons stated in the Petition and supporting *Amicus* briefs, it is respectfully submitted that this Petition for Writ of Certiorari should be granted and the judgment of the New Jersey Supreme Court should be reversed.

Respectfully submitted,

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